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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-4137

D.C. No. CV 85-55-GF

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Plaintiff-Appellant,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Montana
Paul G. Hatfield, District Judge, Presiding

Argued and Submitted: July 8, 1986
Seattle, Washington

OPINION

Filed: Feb. 11, 1988

Before: TANG, PREGERSON, and ALARCON, Circuit Judges.

Opinion by Judge Pregerson

PREGERSON, Circuit Judge:

In this appeal, we must decide whether the Railway Labor Act ("RLA") bars Burlington Northern Railroad Company ("BN") from unilaterally implementing a mandatory urine testing program designed to restrict alcohol

and narcotics use by on-duty railroad workers. The program requires the entire operating crew of a train to submit to urinalysis when the train is involved in a "human factor" accident unless "responsibility [for the accident] is clearly identified." When responsibility it [sic] clearly identified, only those responsible for the accident are tested.

Our resolution of this matter hinges on whether the challenge of the Brotherhood of Locomotive Engineers ("BLE") to BN's urine testing program is a major or minor dispute under the RLA. The district court held that it is a minor dispute because it is "arguably justified" under an implied provision of the collective agreement between BN and BLE. We disagree.

FACTS

For at least 40 years, BN, like many railroads, has enforced a unilaterally implemented safety rule, Rule G. Rule G prohibits BN employees from using alcohol or narcotics while on duty, from possessing such substances while on company property, and from reporting for duty in a state of intoxication that may impede their ability to perform their work safely.[1] The collective bargaining agreements between BN and its employees' unions do not expressly or implicitly refer to Rule G.

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[1] Rule G presently states:

> The use of alcoholic beverages, intoxicants, narcotics, marijuana, or other controlled substances by employees subject to duty, or their possession or use while on duty or on company property is prohibited. Employees must not report for duty under the influence of any marijuana, or other controlled substances, or medication, including those prescribed by a doctor, that may in any way adversely affect their alertness, coordination, reaction, response or safety.

BN unilaterally added the reference to "marijuana, or other controlled substances" in 1980.

Undisputed evidence presented to the district court indicated that, before May 1984, BN relied primarily upon sensory surveillance to enforce Rule G. If an employee's gait, breath, odor, slurred speech, bloodshot eyes, or errant behavior suggested to a supervisor or security officer that the employee was intoxicated, BN suspended the employee pending a formal investigation under established procedures. An employee could avoid suspension by voluntarily submitting to urinalysis.

On April 15, 1984, a train crash in Wiggins, Colorado killed five BN employees and caused $2 million in property damage. The National Transportation Safety Board implicated alcohol abuse by an engineer as a possible cause of the accident. On April 21, a train disobeyed an "absolute stop" signal and crashed into a standing train at Newcastle, Wyoming. Two BN employees died. Property damage totaled $1 million. A toxicology report indicated that three crew members had marijuana traces in their body fluids.

Following these two serious crashes, BN intensified its efforts to enforce Rule G by introducing two new programs. First, BN contracted for trained sniffer dogs to detect narcotics on its premises.[2] Second, it began requiring all crew members involved in a human factor accident or operating rule violation to attend a clinic immediately and submit to urinalysis for the presence of narcotics, unless responsibility for the accident or violation otherwise has been clearly identified. Under the new rule, an employee who refuses to submit to mandatory urinalysis after being involved in a human factor accident or operating rule violation is subject to discipline for insubordination.

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[2] BLE's challenge to BN's sniffer dog program is addressed in our companion case, *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Co.*, No. 85-4138 ("the sniffer dog case").

BLE strenuously opposed BN's new urine testing program and urged BN to end it. BN refused to negotiate. BLE then balloted its branch chairmen on whether to strike on the urinalysis issue. The majority of respondents voted in favor of a strike. BLE filed suit under the RLA. The district court found that BN's urine testing program was "arguably justified" under the collective agreement as amended by custom and practice, and thus constituted a "minor dispute" under the RLA. *Brotherhood of Locomotive Eng'rs v. Burlington N. R.R.*, 620 F. Supp. 173, 175 (D. Mont. 1985). Accordingly, the court concluded that it lacked jurisdiction over the dispute, and granted summary judgment in favor of BN. BLE appeals. We reverse.

STANDARD OF REVIEW

Whether a matter constitutes a mandatory subject of bargaining under the RLA is a question of law which we review de novo. *See Japan Air Lines Co. v. IAM*, 538 F.2d 46, 52-53 (2d Cir. 1976); *cf. NLRB v. Int'l Harvester Co.*, 618 F.2d 85, 87 (9th Cir. 1980).

Whether past conduct constitutes custom and practice sufficient to be incorporated as an implied term in a collective agreement covered by the RLA is a question of fact. *See Missouri Pac. Joint Protective Bd., Bhd. Railway Carmen of the United States and Canada v. Missouri Pac. R.R.*, 730 F.2d 533, 537 (8th Cir. 1984); *cf. Hass v. Darigold Dairy Prods. Co.*, 751 F.2d 1096, 1101 (9th Cir. 1985) (implied terms in collective agreement under NLRA). We accept a district court's determination of questions of fact unless clearly erroneous. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984).

Whether a dispute constitutes a major dispute or a minor dispute under the RLA is a matter of law which we review de novo. *IAM v. Aloha Airlines, Inc.*, 776 F.2d 812, 815 (9th Cir. 1985).

ANALYSIS

BN presents alternative arguments in support of its contention that the district court may not enjoin the mandatory urine testing program. First, BN contends that the enforcement of Rule G is a matter entirely within its managerial prerogative. Alternatively, BN contends that the challenged procedure presents only a minor dispute—over which the district court lacks jurisdiction—because it is arguably justified by implied-in-fact and implied-in-law terms of the collective agreement. We address these arguments in turn.

I. *Management Prerogative*

Neither party disputes that Rule G itself is an implied term of the collective agreement. BN asserts, however, that selection of the *method* used to enforce a safety rule like Rule G is entirely a matter of management prerogative, not subject to collective bargaining under the RLA. Thus, BN contends, its prior enforcement practice cannot be an implied condition of the collective agreement or give rise to a labor dispute within the terms of the RLA.

Under the RLA, certain matters are always subject to collective bargaining; other matters fall within the scope of management prerogative, and are not subject to collective bargaining. The RLA requires railroads "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, *and working conditions.*" 45 U.S.C. § 152 (emphasis added). No court has comprehensively explained the scope of the statutory phrase "working conditions."

In *Japan Air Lines Co. v. IAM*, 538 F.2d 46, 52 (2d Cir. 1976), the second circuit upheld an employer's management prerogative to determine whether to cease subcontracting ground work at certain airports because the "primary impact" of the union's proposal did not affect

the working conditions of the union's *present* members. 538 F.2d at 52. In so holding, the court distinguished the facts of the case before it from those presented in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), and *Order of Railroad Telegraphers v. Chicago & North Western Railway Co.*, 362 U.S. 330 (1964), in which "the critical question was whether those who were working were to lose their jobs." 538 F.2d at 52-53.

Thus, the *Japan Air Lines* court set forth a simple and pragmatic approach: The RLA requires parties to bargain over any proposal whose primary impact is the loss—or potential loss—of existing employment or employment-related benefits. We now adopt this approach as the rule of this circuit. Under BN's chemical testing program, a Rule G violation, however discovered, could result in an employee's discharge. Because jobs of present employees are jeopardized, BN's mandatory urine testing program is a mandatory subject of bargaining under the RLA and may not be implemented unilaterally. Thus, BN's management prerogative claim is unfounded.

II. *Major vs. Minor Dispute*

Under the Railway Labor Act, all disputes between railroads and their employees are either "major disputes" or "minor disputes." These two categories are "sharply distinguished." *See Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 722, (1945), *aff'd on rehearing*, 327 U.S. 661 (1946); *O'Donnell v. Wien Air Alaska, Inc.*, 551 F.2d 1141, 1145-46 (9th Cir. 1975) (tracing historical development of RLA).[3]

Major disputes "concern [either] the formation of collective bargaining agreements or efforts to secure new rights and incorporate them into future agreements."

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[3] The terms "major dispute" and "minor dispute" are not found anywhere in the RLA. The Supreme Court in *Elgin* coined the terms as a methodology to be used by courts confronted with disputes arising under the RLA. *See Aloha*, 776 F.2d at 815 n.2.

Aloha, 776 F.2d at 815 (citing *Elgin*, 325 U.S. at 723). Minor disputes involve the interpretation or application of existing collective bargaining agreements. *Elgin*, 325 U.S. at 723; *Aloha*, 776 F.2d at 815.

Generally, *major* disputes are "left for settlement entirely to the processes of noncompulsory adjustment." *Elgin*, 325 U.S. at 723-24. A detailed procedure is provided in 45 U.S.C. §§ 152, 155, 156, 157, and 160 for moving the dispute through intial conference and negotiation, submission to the National Mediation Board, voluntary arbitration, and, possibly, investigation by a special emergency board appointed by the President. *See Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969). "No authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration." *Elgin*, 325 U.S. at 725. Pending the exhaustion of the RLA's mechanism for resolving a major dispute, the status quo applies. The duty to maintain the status quo may be enforced by obtaining injunctive relief in a federal district court. *See Aloha*, 776 F.2d at 816.

In contrast, *minor* disputes are subject to compulsory and binding arbitration. *See* 45 U.S.C. § 153(first)(i). This task is performed by the National Railroad Adjustment Board or a privately established arbitration panel. *See generally* Seidenberg, *Grievance Adjustment in the Railroad Industry* in *The Railway Labor Act at Fifty* 229-35 (National Mediation Board ed., 1976). The arbitrators have *exclusive* jurisdiction over minor disputes. *See Slocum v. Delaware, Lackawanna & W. R.R.*, 339 U.S. 239, 244-45 (1950). Thus, federal courts have no subject matter jurisdiction over minor disputes. *Aloha*, 776 F.2d at 815. When only a minor dispute is involved, there is no duty to maintain the status quo and judicial review of the arbitration panel's decision is extremely limited. *See Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 91 (1978) (per curiam).

The test in our circuit for determining whether a dispute involves only the interpretation or application of an existing agreement (and is therefore minor) or involves the formation of a collective agreement or a unilateral effort to change working conditions (and is therefore major) was established in *Switchmen's Union of North America v. Southern Pacific Co.*, 398 F.2d 443, 447 (9th Cir. 1968). *See Aloha*, 776 F.2d at 815-16; *O'Donnell*, 551 F.2d at 1146-47; *Southern Pac. Transp. Co. v. United Transp. Union*, 491 F.2d 830, 832 (9th Cir.), *cert. denied*, 416 U.S. 985 (1974). We have reformulated the test several times. *See Switchmen's*, 398 F.2d at 447 (only if the disputed action is "in nowise contemplated or arguably covered by the agreement" does it give rise to a major dispute); *Southern Pac. Transp. Co.*, 491 F.2d at 832-33 (A dispute is minor when a contract provision is "reasonabl[y] susceptible" to a party's interpretation.); *O'Donnell*, 551 F.2d at 1146 ("Is the position of at least one of the parties *arguably* predicated on the terms of an agreement?"); *Aloha*, 776 F.2d at 816 (major dispute concerns issue "neither contemplated nor arguably covered" by collective agreement).

The district court accurately summarized the essence of these various reformulations as *whether the railroad's actions are "arguably justified" by the collective agreement* between BN and the BLE. *See* 620 F. Supp. at 175. If the railroad's actions *are* arguably justified, the dispute is a *minor* dispute; if they are *not* arguably justified, the dispute is a *major* dispute. When in doubt, courts construe disputes as minor. *See O'Donnell*, 551 F.2d at 1146-47 (*Switchmen*'s test "is not a stringent one"); *Brotherhood of Locomotive Engineers v. Atchison, Topeka and Santa Fe Railway Co.*, 768 F.2d 914, 920 (7th Cir. 1985) (citing cases).

A railroad collective agreement includes not only express terms, but terms implied by past practice and by law. *See Detroit & Toledo Shore Line R.R. v. United*

Transp. Union, 396 U.S. 142, 153 (1969) (the status quo in a major dispute includes employment terms established by past practice); *Maine Cent. R.R. v. United Transp. Union*, 787 F.2d 780, 782-83 (1st Cir.) (railroad's assertion that proposed action comported with past custom and practice was arguably correct and thus dispute was minor), *cert. denied*, 107 S. Ct. 169 (1986); *Railway Labor Executives' Ass'n v. Atchison, Topeka & Santa Fe Ry.*, 430 F.2d 994, 996 (9th Cir. 1970) (parties' failure to include a provision in the agreement may indicate that they were relying on the language of a statute to fill the gap), *cert. denied*, 400 U.S. 1021 (1971).

It is clear that BN's new mandatory urine testing program does not fall within the scope of any *express* provision of the collective agreement. Therefore, in determining whether BN's chemical testing program constitutes a major or a minor dispute, we must decide whether it is "arguably justified" by any *implied* provision of the agreement. If it *is* "arguably justified" by either a term implied by past practice (an "implied-in-fact" term) or a term implied by statute or regulation (an "implied-in-law" term), then the dispute is minor, and the federal courts lack jurisdiction to enjoin the program.

A. *Implied-in-Fact Terms*

As an initial matter, we note that both Rule G and its customary enforcement by sensory surveillance were implied-in-fact terms of the collective agreement between BN and BLE. Several BLE officials with extensive experience regarding BN's operating procedures testified that sensory surveillance by BN's supervisors had been the only regular method of Rule G enforcement for over forty years. BLE had long acquiesced in this practice. BN has never disputed that sensory surveillance by BN's supervisors was the primary means of detecting Rule G violations before 1984.

BN contends that its urine testing program is arguably justified by the past practice of sensory surveillance. In the companion "sniffer dog case," the district court determined that the custom and practice of relying on sensory surveillance to detect Rule G violations arguably justified *any* reasonable enforcement method based on "a modicum of evidence." *Brotherhood of Locomotive Eng'rs v. Burlington N. R.R.*, 620 F. Supp. 163, 171 (D. Mont. 1985). In the instant case, the district court concluded that such an implied condition arguably justified BN's mandatory urine testing program because "the use of urinalysis was [not] done on a completely random basis. Rather .... BN subjects an employee to urinalysis when the employee is believed to have been involved in an operating rule violation." *Brotherhood of Locomotive Eng'rs v. Burlington N. R.R.*, 620 F. Supp. 173, 175 (D. Mont. 1985). This conclusion ignores the critical differences between the old method and the new method: The old method of enforcing Rule G was voluntary, and required particularized suspicion; the new method is mandatory, and requires only generalized suspicion.

We do not agree that BLE, by acquiescing in Rule G's enforcement by sensory surveillance, can be said to have agreed to allow BN to implement *any* procedure beyond sensory surveillance so long as the procedure is brought into play by a "modicum of evidence" or an "objective triggering event." The kind of sensory surveillance that BN's supervisors had employed in the past—observing an employee's gait, breath, odor, slurred speech, or blood shot eyes—was non-intrusive. It did not implicate the serious privacy intrusions posed by BN's use of mandatory urine testing. Moreover, the sensory surveillance employed by BN's supervisors in the past required suspicion of individual workers based on their conduct and appearance, whereas the new mandatory urine testing procedure may be imposed on the basis of generalized suspicion encompassing an entire train crew.

Our analysis here is aided by reference to fourth amendment doctrine. BN is not a government agency and, therefore, is not subject to the restrictions of the fourth amendment. However, the focus of our inquiry—both under the fourth amendment and under an implied provision of a collective agreement—is the expectation of privacy of those who will be subject to urine testing. *See O'Connor v. Ortega*, 107 S. Ct. 1492, 1497-99 (1987) (reasonableness of a search under the fourth amendment depends on reasonable expectations of privacy); *Shoreline*, 396 U.S. at 153 (the terms of a collective agreement include "actual, objective working conditions and practices, broadly conceived. . . .").

In *Railway Labor Executives' Association v. Burnley*, No. 85-2891, we struck down federal railway safety regulations requiring a mandatory chemical testing program similar to BN's program at issue here. We concluded in *Burnley* that the fourth amendment requires "a degree of particularized suspicion" of the use of alcohol or a controlled substance before a railroad employee can be subject to mandatory drug testing. This analysis is readily applicable here. A railroad worker has certain expectations regarding whether the government may invade his or her privacy under the fourth amendment. Similarly, a railroad worker has certain expectations regarding whether an employer may engage in a similar invasion of privacy under an implied provision of a collective agreement. These expectations are related: Although the source of the invasion is different, the privacy interest is the same. In the case of urine testing programs, the Constitution draws a line between those programs based on particularized suspicion and those based on generalized suspicion. *Burnley* at ——. The former are permissible; the latter are not. We decline to assume that BLE members implicitly grante' BN the authority to invade their privacy in ways the government could not.

BN's new mandatory urine testing program is a clear change in working conditions governed by the collective

agreement and, thus, by definition, a major dispute. It is a mistake to conclude that BLE impliedly agreed to the new testing program just because "through custom and practice" it had for forty years accepted enforcement of Rule G by the non-intrusive procedure of sensory surveillance. BN's new procedure requiring mandatory urine testing of all members of a train's crew is not arguably justified by the implied provision in the collective agreement allowing BN to enforce Rule G by voluntary urinalysis based on information from sensory surveillance.

B. *Implied-in-Law Terms*

BN also contends that its new mandatory testing program is justified by an implied-in-law provision of the collective agreement. It argues that federal regulations mandating chemical testing of railroad workers constitute an implied-in-law term of its agreement with BLE.

It is true that Federal Railway Administration regulations mandated a chemical testing program similar to the program imposed unilaterally by BN. *See* 49 C.F.R. §§ 219.201, 219.203, and 219.213. However, we have struck these regulations down on constitutional grounds. *Railway Labor Executives Ass'n v. Burnley*, No. 85-2891. They no longer retain any legal force. No other legislative or administrative pronouncement stands either for or against the challenged program. Therefore, generalized mandatory urine testing is not an implied-in-law condition of the collective agreement, and BLE's resistance to that program constitutes not a minor, but a major dispute.

REVERSED AND REMANDED.

ALARCON, Circuit Judge, dissenting:

I respectfully dissent. I would hold that BN's testing practice is arguably permitted under the parties' implied agreement. Therefore, the dispute is minor and should be referred to the National Railway Adjustment Board for resolution.

The majority's opinion is contrary to the Eighth Circuit's well-reasoned analysis of precisely the same issue in *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R.*, 802 F.2d 1016 (8th Cir. 1986). Indeed, the only difference between the question presented in this matter and the issue before the Eighth Circuit is the identity of the union challenging the testing policy. In all other respects the facts and legal questions are identical. The majority's opinion creates an intercircuit conflict. I would adopt the Eighth Circuit's analysis and affirm the district court.

I cannot join in the majority opinion because I believe that the reasoning process employed by my esteemed colleagues is critically flawed. The majority acknowledges that the test for determining if a particular labor practice raises a major or minor dispute is whether the disputed action is "arguably permitted" by the collective bargaining agreement. Thus, the issue presented in this matter is whether post-incident testing is arguably permitted by Rule G.

After correctly stating the applicable test, the majority proceeds to ignore it. Instead of determining whether post-incident testing is arguably permitted by Rule G, the majority abandons the proper test and applies the Fourth Amendment to an agreement between non-governmental actors. In determining whether the testing policy is arguably permitted by the agreement, the majority first inquires whether the *Government* could undertake the post-incident testing procedures prescribed by BN. The majority then responds to this false issue by arguing that

if such tests were performed by the government they would violate the Fourth Amendment. The majority then concludes that post-incident testing is not encompassed within the collective agreement because it "decline[s] to assume that BLE members implicitly granted BN the authority to invade their privacy in ways the government could not."

The Fourth Amendment has no bearing on the *parties'* understanding of their rights and obligations under the collective bargaining agreement. The majority's new test would make the intention of the parties irrelevant to a proper interpretation of their agreement. The law of this circuit, however, dictates that we focus on the collective bargaining agreement in determining whether post-incident testing is arguably permitted. *Int'l Assoc. of Machinists & Aerospace Workers v. Aloha Airlines, Inc.*, 790 F.2d 727, 815-16 (9th Cir. 1986) (Pregerson, J.), *cert. denied* [sic] U.S. ——, 107 S. Ct. 400. Private parties are free to enter into agreements in the interests of public safety and the welfare of co-workers that permit a limited intrusion into privacy rights. The Fourth Amendment is directed at governmental intrusions into privacy interests. *United States v. Jacobsen*, 466 U.S. 109, 113-14 (1984). It has not previously been applied by any court to the conduct of private parties. Furthermore, neither party suggested in its briefs or at oral argument that a Fourth Amendment analysis can be applied to the interpretation of an agreement between a union and a private employer.

The majority has failed to explain why it did not request additional briefing and oral argument concerning this radical departure from fourth amendment analysis and the law of this circuit regarding the interpretation of collective bargaining agreements. The General Orders of this Circuit provide that "[i]f a panel determines to decide a case upon the basis of a significant point not raised by the parties in their briefs, it should give con-

sideration to requesting additional briefing before issuing a disposition predicated on the particular point." The United States Court of Appeals for the Ninth Circuit, *General Order* 13 (September, 1987).

I. FACTS AND PROCEDURAL HISTORY

This dispute arises out of BN's change in the procedure used to detect violations of Rule G. Rule G provides:

> The use of alcoholic beverages, intoxicants, narcotics, marijuana, or other controlled substances by employees subject to duty, or their possession or use while on duty or on company property, is prohibited. Employees must not report for duty under the influence of any marijuana or other controlled substances, or medication, including those prescribed by a doctor, that may in any way adversely affect their alertness, coordination, reaction, response or safety.

Any on-duty employee found to be in violation of Rule G is subject to suspension or discharge. Rule G has been in effect at BN and in the railroad industry in slightly varying forms for at least 40 years. The parties' collective bargaining agreements are silent as to the methods of implementing Rule G or detecting and enforcing violations thereof.

For many years, BN relied upon sensory observations to detect Rule G violations. Employees were suspected of Rule G violations if BN trainmasters and superintendents observed symptoms of intoxication such as staggering, slurred speech, bloodshot eyes, or alcoholic breath. If a BN officer detected alcohol or drug use by an employee, the worker was asked to take a urine test to clear himself. Under the prior practice, an employee was not requested to submit to a urine test until there was sufficient facts to establish "probable cause" to believe that the employee had violated Rule G. If the employee refused to take the urine test, he was not disciplined for insubordination.

However, an employee could be suspended for violation of Rule G based solely on the presentation of evidence of a visual observation of objective symptoms of intoxication.

In 1984, two accidents occurred on BN trains in which several individuals were fatally injured. The evidence gathered by BN investigators pointed to controlled substance or alcohol impairment by the operating crews. Shortly after these tragic events, BN intensified use of urine testing.[1] On November 5, 1984, Charles J. Bryan, BN's Senior Vice-President of Operations, distributed a memorandum (hereinafter the Bryan Memorandum) to BN officers which "amplifi[ed] and restat[ed] BN's existing policy defining when 'probable cause' exists sufficient to require urinalysis tests to detect possible Rule G violations by BN operating employees." Under the Bryan Memorandum's interpretation of the sweep of Rule G, blood or urine testing became mandatory following an accident or operating rule violation. The Bryan Memorandum directed that "when responsibility is clearly identified," a train's entire operating crew, or separate individuals be sent to a clinic for a urinalysis sample after (1) a "major human factor accident," i.e., a major collision involving more than one train or one switching movement, (2) a "minor human factor accident," i.e., derailments in yard or industry switching, failures to respond to signals, run through switches or derails, and failures to secure, and (3) a BN supervisor detects an employee displaying abnormal behavior. Blood or urine testing is required only following a human-factor accident,

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[1] On April 15, 1984, a train crash in Wiggins, Colorado killed five BN employees and caused $2 million property damage. The National Transportation Safety Board (hereinafter NTSB) implicated alcohol abuse by an engineer as a possible cause of the accident. On April 21, 1984, a train disobeyed an absolute stop signal and crashed into a standing train at Newcastle, Wyoming. Two BN employees died and property damage totalled $1 million. A NTSB toxicology report indicated that three crew members had marijuana traces in their body fluids.

not an equipment-related accident. An employee who refuses to submit to a blood or urine test is subject to discipline for insubordination.

BN also utilized trained dogs to detect the possession of controlled substances (hereinafter sniffer dogs) prohibited by Rule G. The Brotherhood filed a complaint on August 29, 1984, seeking declaratory and injunctive relief challenging the use of sniffer dogs. The district court determined that the dispute regarding the use of sniffer dogs was major and granted a permanent injunction. The issue raised by the random use of sniffer dogs is presented in a companion case filed this same date. *Brotherhood of Locomotive Eng'rs v. Burlington Northern R.R.* (No. 85-4138) (hereinafter the sniffer dog case.)[2]

In December 1984, Robert E. Pelava, the General Chairman for the Brotherhood, notified BN that the Brotherhood objected to the mandatory urine or blood testing practice. BN and the Brotherhood unsuccessfully attempted to resolve the dispute. The Brotherhood then sought to amend its complaint in the sniffer dog case to enjoin the mandatory blood or urine testing. The district court denied the motion to amend the pleading.

On January 7, 1985, BN filed a notice of intent to submit the blood or urine testing issue for arbitration as a "minor" dispute with the Adjustment Board pursuant to 45 U.S.C. § 153, First (i), of the RLA.[3] On

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[2] The district court referred to the sniffer dog case as *BLE I, Bhd. of Locomotive Eng'rs v. Burlington Northern R.R.*, 620 F. Supp. 173, 174 (D. Mont. 1985).

[3] 45 U.S.C. § 153, First (i) provides:

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes

February 6, 1985, BN filed its formal submission to the Adjustment Board.

On February 14, 1985, the Brotherhood filed a complaint in federal district court for declaratory and injunctive relief. The Brotherhood sought (1) an injunction prohibiting BN's mandatory urine and blood testing practice, (2) an injunction prohibiting BN from proceeding with its submission before the Adjustment Board, and (3) a declaration that BN's testing practice violated the parties' collective bargaining agreements. On March 7, 1985, the Brotherhood filed a motion for a preliminary injunction. BN thereafter filed a motion to dismiss the Brotherhood's complaint. BN alleged that the Adjustment Board has exclusive subject matter jurisdiction over the question because it was a "minor" dispute under the Act.

After conducting an evidentiary hearing, the district court treated BN's motion to dismiss as a motion for summary judgment under Fed. R. Civ. P. 12(b)(6).[4] *Brotherhood of Locomotive Eng'rs*, 620 F. Supp. at 174 n.1, 175. In addition to considering the evidence presented at the hearing on the motion for a preliminary

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may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

[4] Fed. R. Civ. P. 12(b)(6) provides in pertinent part:

> Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . . .

injunction and motion to dismiss, the court took judicial notice of the record and facts established in the sniffer dog case. *Id.* at 174.

The district court noted that the collective bargaining agreements between the parties made no reference to Rule G, nor to any specific method of detecting alcohol and controlled substance abuse, or to blood or urine tests. The courts found, however, that the procedure for the detection and investigation of alcohol or controlled substance abuse adopted by the railroad, and acquiesced in by the union, had existed over a substantial period of time and had become an implied provision or condition of the collective bargaining agreement. *Id.* at 175; *Brotherhood of Locomotive Eng'rs*, 620 F. Supp. at 170. As described above, the procedure employed by the railroad to implement Rule G consisted of sensory observation by a supervisor of objective symptoms of alcohol or substance abuse, such as slurred speech, staggered walk, alcoholic breath, followed by a voluntary blood or urine test, if the employee wished to clear himself of suspicion. The district court held that because the facts alleged in the Brotherhood's complaint and the evidence presented at the hearing demonstrated that BN employees were requested to submit to blood or urine tests when a specific worker was believed to have been involved in an accident or operating rule violation, the challenged mandatory blood or urine testing procedure was "arguably justified" under the term of the "implied agreement extant between the parties." *Brotherhood of Locomotive Eng'rs*, 620 F. Supp. at 175. The district court held that it lacked subject matter jurisdiction because the dispute was minor. *Id.*

II. STANDARD OF REVIEW

This court reviews a district court's grant of summary judgment *de novo*, in the light most favorable to the nonmoving party, to determine whether there are any genuine issues of material fact and whether the district

court correctly applied the relevant substantive law. *Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir. 1986).

III. RESOLUTION OF DISPUTES UNDER THE ACT

The fundamental issue raised in this action is whether BN's implementation of its mandatory urine and blood testing practice to detect Rule G violations, following an accident or an operating rule violation, constitutes a change in working conditions accomplished in violation of the notice, negotiation, and mediation requirements imposed by sections 2 and 6 of the RLA, 45 U.S.C. §§ 152, Seventh, and 156.[5] Resolution of this issue depends on whether the controversy between the Brotherhood and BN is a "major" or "minor" dispute under the Act.[6]

Major disputes involve

> the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

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[5] 45 U.S.C. § 152, Seventh, provides: "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

45 U.S.C. § 156 provides in pertinent part:

> Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference . . . .

[6] The RLA does not use the terms "major" and "minor" to distinguish disputes. *Int'l Assoc. of Machinists v. Aloha Airlines, Inc.*, 776 F.2d 812, 815 n.2 (9th Cir. 1985). The terminology was utilized by the Supreme Court in *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 722-28 (1945).

325 U.S. at 723; 790 F.2d at 730 n.1 (9th Cir. 1986). In contrast, minor disputes presuppose the existence of an agreement or "a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case." *Elgin*, 325 U.S. at 723; *Aloha Airlines*, 790 F.2d at 730 n.1. The distinction between major and minor disputes is imprecise and has plagued the courts. *O'Donnell v. Wien Air Alaska, Inc.*, 551 F.2d 1141, 1146 (9th Cir. 1977).

A. *Major Disputes*

The distinction between major and minor disputes has important consequences regarding the applicable procedures for dispute resolution and the authority of the courts to intervene. *Id.* The railroad must give at least, 30 days notice of a proposed change in the "rates of pay, rules, or working conditions." 45 U.S.C. § 156. A dispute arising from the proposed change is known as a major dispute. *O'Donnell*, 551 F.2d at 1146. The parties are required to confer and "to exert every reasonable effort" to settle disputes. 45 U.S.C. § 152, First.[7] If conference fails, either party may invoke the services of the National Mediation Board. 45 U.S.C. § 155. If

[7] The RLA treats major and minor disputes alike in requiring negotiation as the first step toward settlement. 45 U.S.C. § 152, First, Second. 45 U.S.C. § 152 provides:

> First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise . . . .
>
> Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

mediation fails, the Mediation Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can only take place if both parties consent. 45 U.S.C. §§ 155, First, 157. If arbitration is rejected, the parties are relegated to self-help in adjusting the dispute. *Brotherhood of Locomotive Eng'rs v. Baltimore & O. R.R. Co.*, 372 U.S. 284, 291 (1963) (per curiam); *Trans Int'l Airlines, Inc. v. Int'l Brotherhood of Teamsters*, 650 F.2d 949, 960 (9th Cir. 1980), *cert. denied sub. nom., Air Line Pilots Assoc. Int'l v. Trans Int'l Airlines, Inc.*, 449 U.S. 1110 (1981). If the dispute threatens "substantially to interrupt interstate commerce," the President may create an emergency board to investigate and report on the dispute. 45 U.S.C. § 160.

The RLA requires both parties to maintain the status quo of a major dispute during the mediation and conference process. 45 U.S.C. §§ 152, 155, 156, 160; *see Detroit & T. S. L. R.R. v. United Transp. Union*, 396 U.S. 142, 149, n.14 (1969). A district court may enjoin either party from violating the status quo. *See O'Donnell*, 551 F.2d at 1146. The procedures of the RLA to resolve major disputes are purposely long and drawn out in the hope that reason and practical considerations will in time provide an agreement that resolves the dispute. *Brotherhood of Ry. & S.S. Clerks v. Florida E. C. Ry.*, 384 U.S. 238, 246 (1966).

B. *Minor Disputes*

If a railroad takes action arguably permitted under the collective bargaining agreement, *not* entailing a change in rates of pay, rules, and working conditions, a union's opposition based on a differing interpretation of the agreement is considered to be a minor dispute subject to binding adjudication by the Adjustment Board. *O'Donnell*, 551 F.2d at 1146-47. Either party may submit the dispute to the Adjustment Board for decision, provided the party has discharged the initial duty of at-

tempting to resolve the issue through negotiation. 45 U.S.C. § 153, First (i). The Adjustment Board is an administrative tribunal composed of workers and management, 45 U.S.C. § 153, First (a), (h), created to secure the prompt, orderly, and final settlement of minor disputes that arise between employees and railroads regarding rates of pay, rules, and working conditions. *Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 94 (1978). The Adjustment Board has exclusive jurisdiction to resolve minor disputes. 45 U.S.C. § 153, First (i); *accord Slocum v. Delaware, L. & W. R.R.*, 339 U.S. 239, 244-45 (1950); *Brotherhood of R.R. Trainmen v. Denver & R. G. W. R.R.*, 290 F.2d 266, 269 (9th Cir.), *cert. denied*, 366 U.S. 966 (1961). The federal courts have no jurisdiction to adjudicate the merits of a minor dispute. *Aloha Airlines*, 776 F.2d at 815.

In establishing the procedures for dispute resolution, Congress considered it essential to keep "minor" disputes within the Adjustment Board and out of the courts. *Sheehan*, 439 U.S. at 94. In *Slocum*, the Supreme Court stated that the Adjustment Board is better suited to resolve minor disputes in the railroad industry involving the application or interpretation of an agreement than federal courts:

> The Act thus represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements. The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon. Long and varied experiences have added to the Board's initial qualifications. Precedents established by it, while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems.

339 U.S. at 243 (footnote omitted); *see Order of Ry. Conductors v. Pitney*, 326 U.S. 561, 567 (1946).

A controversy arises, as in the present case, when a union believes a railroad has unilaterally changed working conditions in violation of the bargaining and mediation procedures imposed by 45 U.S.C. §§ 152, Seventh, and 156, thus creating a major dispute, and a railroad believes its challenged action is arguably permitted by the terms of the parties' agreements, and is therefore, subject to resolution only by the Adjustment Board under 45 U.S.C. § 153, First (i), as a minor dispute.

C. *The Test To Determine a Minor Dispute*

As a threshold issue, the Brotherhood contends the use of the "arguably justified" test by the district court to determine if the dispute is major or minor is "questionable." The question whether a district court applied the correct test to determine if a dispute is minor or major under the Act is a question of law which we review *de novo*. *See Aloha Airlines*, 776 F.2d at 815 (the question whether a dispute is major or minor is a "narrow question of law.").

This court has consistently followed the rule in *Switchmen's Union of N. Amer. v. Southern Pacific Co.*, 398 F.2d 443 (9th Cir. 1968) in determining whether a dispute is major or minor. *O'Donnell*, 551 F.2d at 1147. A dispute is minor if the position of at least one of the parties is arguably predicated on the terms of the collective bargaining agreement. *Switchmen's Union*, 398 F.2d at 447; *O'Donnell*, 551 F.2d at 1146. Stated another way, a dispute is minor if the parties' agreement is "reasonably susceptible" to the railroad's interpretation. *Southern Pacific Transp. Co. v. United Transp. Union*, 491 F.2d 830, 833 (9th Cir.), *cert. denied*, 416 U.S. 985 (1974). On the other hand, "if it can be said that the change being imposed by one side on the other is in nowise contemplated or arguably covered by the agreement," the dispute is major. *Switchmen's Union*, 398 F.2d at 447. The test "is not a stringent one in view

of the substantial and long-standing interest in removing labor disputes from the federal courts and placing them in the expert hands of the various arbitration and mediation facilities." *O'Donnel*, 551 F.2d at 1146-47.

In the instant case, the district court posed the issue as follows: "[W]hether the urinalys[i]s practice is 'arguably justified' by the implied agreement, regarding Rule G, found to exist between the Brotherhood and the BN . . . ." *Brotherhood of Locomotive Eng'rs*, 620 F. Supp. at 175. Thus, the district court applied the appropriate test to determine whether the dispute was major or minor.

IV. THE PARTIES' IMPLIED AGREEMENT

The Brotherhood contends the district court erred in concluding that BN's mandatory blood or urine testing practice is "arguably justified" by the parties' implied agreement regarding the procedure to be followed in the detection of Rule G violations because the testing practice (1) eliminates elements of the parties' implied agreement, (2) creates a new condition of employment, and (3) is completely distinguishable from the company's prior procedure.

A railroad is not limited to the four corners of the collective bargaining agreement to show that a change in a working condition does not constitute a major dispute. *Brotherhood of Locomotive Eng'rs v. Boston & Main Corp.*, 788 F.2d 794, 799 (1st Cir. 1986), *cert. denied*, —— U.S. ——, 107 S.Ct. 111. This rule is particularly applicable to the railroad industry:

> It would be virtually impossible to include all working conditions in a collective-bargaining agreement. Where a condition is satisfactorily tolerable to both sides, it is often omitted from the agreement, and it has been suggested that this practice is more frequent in the railroad industry than in most others.

Shore Line, 396 U.S. at 154-55 (footnote omitted). The railroad can rely on "'those actual, objective working conditions out of which the dispute arose, and clearly these conditions need not be covered in an existing agreement.'" *Brotherhood of Locomotive Eng'rs v. Boston & Main Corp.*, 788 F.2d at 799 (quoting *Shore Line*, 396 U.S. at 153). Accordingly, past practices and working conditions may become part of the collective bargaining agreement notwithstanding silence in the agreement itself. *Maine Central R.R. v. United Transp. Union*, 787 F.2d 780, 782 (1st Cir. 1986), *cert. denied*, —— U.S. ——, 107 S.Ct. 169; *cf. Switchmen's Union*, 398 F.2d at 447 ("where the position of one or both of the parties is expressly and arguably predicated on the terms of the agreement, *as illuminated by long-standing practices*, the question of whether the position is well taken involves a minor dispute") (emphasis added). For a past practice to be considered an "actual, objective working condition[ ]," it must have occurred "for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions." *Shore Line*, 396 U.S. at 153, 154; *Brotherhood of Locomotive Eng'rs v. Boston & Maine* [sic] *Corp.*, 788 F.2d at 799.

It is undisputed that the parties' collective bargaining agreements are silent as to the procedure to be followed in detecting and testing for alcohol and substance abuse. The evidence amply demonstrates, however, that the Brotherhood has acquiesced in the procedure followed by BN in the detection and enforcement of Rule G violations for many years. The undisputed evidence established that prior to the Bryan Memorandum, BN relied upon the existence of objective indicators of alcohol or substance abuse as a prerequisite to the investigation of a possible Rule G violation. The triggering event for the investigation of a Rule G violation was the observation that a specific employee's speech was slurred, his gait was staggered, his eyes were bloodshot, or his breath smelled

of alcohol. A worker observed in such a condition was cited for a Rule G violation and advised that a further investigation and a hearing might follow. When viewed in the light most favorable to the Brotherhood, the evidence supports the district court's determination that "the practice of detecting Rule G violations by means of sensory observation . . . has achieved the level of an established practice, deserving of an implied contractual status."

V. THE EXPANDED TESTING PROCEDURE WAS ARGUABLY JUSTIFIED

The next inquiry should be whether the implied agreement—that BN could require further investigation for a Rule G violation after the perception of facts that a specific worker had exhibited symptoms of alcohol or substance abuse—arguably includes the right to conduct blood or urine testing, after an accident or operating rule violation, to confirm or disprove a violation of Rule G. If blood or urine testing following an accident or operation rule violation is arguably included in the implied terms of the collective bargaining agreement, the procedure set forth in the Bryan Memorandum presents a minor dispute.

The Brotherhood contends that the district court erred in granting sumary judgment because material facts are in dispute. The Brotherhood argues that the evidence shows that the mandatory blood or urine testing practice is not "arguably justified" by the parties' implied agreement because prior to the release of the Bryan Memorandum, (1) no employee was subjected to a compulsory body fluid test solely because he was involved in an accident or operation rule violation, (2) agents of BN admitted that the mandatory testing practice was "new," and (3) the testing after the perception of symptoms of alcohol or substance abuse was optional, not mandatory.

Summary judgment is appropriate if the plaintiff cannot prevail as a matter of law when the facts are viewed in his favor. *See Anderson v. Liberty Lobby, Inc.*, —— U.S. ——, 106 S. Ct. 2505, 2510 (1986) ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted"). Under this court's test to determine if a dispute is minor, the challenged conduct need not exactly mirror the practices which have become an implied provision of the collective bargaining agreement. The challenged conduct need only be *arguably* covered by the parties' implied agreement to be a minor dispute. *Switchmen's Union*, 398 F.2d at 447; *O'Donnell*, 551 F.2d at 1146; *see Southern Pacific Transp. v. United Transp. Union*, 491 F.2d at 833; *accord Brotherhood of Ry. Carmen v. Norfolk & W. Ry. Co.*, 745 F.2d 370, 376-77 (6th Cir. 1984) ("courts are called upon to determine only whether the railroad's contention is arguable, not to determine whether that contention is correct").

While it is true that as a result of the Bryan Memorandum, blood or urine testing became mandatory following an accident or operating rule violation, I agree with the district court that the testing practice nonetheless is arguably permitted under the parties' implied agreement. Both the old and the new procedure involve similar triggering events: the discovery of objective facts suggesting alcohol or substance abuse followed by the use of blood or urine testing to determine if the employee had violated Rule G. Whether mandatory testing is arguably consistent with the prior practice of affording an employee the opportunity to clear himself by a chemical test presents a minor dispute outside the jurisdiction of a federal court. Once a railroad has presented evidence of a past practice that was accepted by the union which, arguably, could support its interpretation of the agreement, the court's inquiry must end; the duty to weigh

and decide who has the better argument is the arbitrator's function. *Maine Cent. R.R. v. United Transp. Union*, 787 F.2d at 782.

The fact that management referred to the blood or urine test procedure as "new" is not controlling. The major-minor dispute dichotomy does not turn on the terminology employed by the parties, but on the substance of the dispute. *Switchmen's Union*, 398 F.2d at 447. It is undisputed that the mandatory blood or urine testing practice following an accident or rule violation was an innovation. I agree with the district court that it is arguable that because the present procedure does not come into play unless there is an objective triggering event which justifies the investigation of a suspected Rule G violation, the urine or blood testing falls within the implied contractual condition of the collective bargaining agreement.

Since there is no genuine issue of material fact that might affect the outcome of the suit, *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. at 2510-2511, the district court correctly concluded that the mandatory urine or blood testing practice presents a minor dispute.

My conclusion that post-incident testing poses only a minor dispute is supported by the Eighth Circuit's recent decision in *Brotherhood of Maintenance of Way Employees*. In that case, BN's maintenance of way workers also sought to enjoin application of BN's post-incident testing policy contending that it presented a major dispute under the RLA.

The district court found that the union had acquiesced in BN's non-random "sensory surveillance" method of enforcing Rule G, and thus that that practice became an implied term of the collective agreement. *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R.*, 642 F. Supp. 41, 45 (N.D. Iowa, 1985). It held post-incident testing "arguably" could be seen as

a refinement of the accepted enforcement policy because "post-incident testing . . . [is] not done randomly since it . . . [is] performed after an incident which . . . [gives] rise to the possibility of usage of drugs and/or alcohol." *Id.* at 46-47. Accordingly, the court held that the dispute over post-incident testing was minor and thus it refused to issue the injunction. *Id.* at 47-48.

The Eighth Circuit affirmed the denial of the injunction. Inasmuch as the testing policy was not implemented randomly, it did not constitute "such a serious departure from past practice as to give rise to a major dispute." *Brotherhood of Maintenance of Way Employees*, 802 F.2d at 1023.

VI. CONSTITUTIONAL CLAIMS

The Brotherhood finally contends that the district court erred in granting summary judgment because the federal and state constitutional claims in the complaint were not resolved. The Brotherhood suggests that this court should remand the case to the district court for resolution of these claims.

To adjudicate the constitutional issues presented in the Brotherhood's pleading, the district court would have had to reach the merits of the dispute. This minor dispute must be resolved initially by the arbitration procedures set forth under the Act before judicial intervention. The district court lacks subject matter jurisdiction to intervene until the minor dispute is resolved. The district court properly stayed its hand.

VII. MANAGEMENT PREROGATIVE

The BN contends that since no provision of the collective bargaining agreement between the parties restricts the BN with regard to the methods or procedures for detecting violations of Rule G, the method of detection is a matter within BN's managerial preroga-

tive. Therefore, BN reasons, its unilateral implementation of a particular method of detection does not rise to the level of a labor dispute within the Act.

The mere absence of any reference in the collective bargaining agreements to a particular method or detection, standing alone, does not establish that the method which may be utilized to detect violations is a matter within the prerogative of management. The absence of specific language may reflect, as in this case, the fact that particular practices have, through acquiescence, become an implied part of the collective bargaining agreement. *Shore Line*, 396 U.S. at 155.

CONCLUSION

I would affirm the judgment of the district court. I would hold that BN's blood or urine testing practice is a minor dispute arguably permitted by Rule G.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-4137

DC CV-85-55-GF

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Plaintiff-Appellant,
vs.
BURLINGTON NORTHERN RAILROAD COMPANY,
Defendants-Appellees.

ORDER

[Filed Mar. 4, 1988]

Before: PREGERSON, *Circuit Judge*

Appellees' motion for a stay of mandate pending application for a writ of certiorari is GRANTED. Fed. R. App. P. 41(b).

UNITED STATES DISTRICT COURT
D. MONTANA
GREAT FALLS DIVISION

No. CV-85-055-GF

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Plaintiff,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Defendants.

July 31, 1985

MEMORANDUM AND ORDER

HATFIELD, District Judge.

The plaintiff, Brotherhood of Locomotive Engineers ("Brotherhood"), instituted the present action for declaratory and injunctive relief, to enjoin the defendant, Burlington Northern Railroad Company ("BN"), from subjecting members of the Brotherhood to urine-testing, designed to curtail the "on-duty" use of alcohol and other intoxicating substances by employees, as forbidden by a safety rule of the BN. The action follows "on the heels" of another action decided today by this court, involving the BN's utilization of dogs trained to detect the presence of drugs or controlled substances in the personal effects of "on-duty" employees. *See, Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Company*, 620 F.Supp. 163 (D.Mont.1985) ("BLE I"). Both actions involve the issue of whether the BN's unilateral implementation of the procedures at issue to detect vio-

lations of the BN's safety rules prohibiting the "on-duty" possession or use of intoxicants by its employees violates the pertinent provision of the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.* The present action is before the court on motion of the BN requesting the court to enter summary judgment in its favor with respect to the claims advanced by the Brotherhood.[1]

The issue which the court must ultimately resolve is whether the BN's unilateral implementation of its mandatory urine-testing policy constitutes a change in working conditions, accomplished in violation of the notice, negotiation and mediation requirements imposed by § 2 in conjunction with § 6 of the RLA, 45 U.S.C. §§ 152 and 156. Restated, the court must decide whether the controversy regarding BN's implementation presents a "major" or "minor" dispute within the meaning of the RLA. *See, Elgin, Joliet & Eastern Railway Company v. Burley*, 325 U.S. 711, 65 S.Ct. 1282, 89 L.Ed. 1886 (1944).

In a memorandum entered in *BLE I* on this day, the court set forth its interpretation of the state of the law with respect to (1) the meaning of the term "working condition" as used in the § 2, Seventh and § 3, First (i) of the RLA, 45 U.S.C. §§ 152, Seventh and 153, First (i); and (2) the major-minor dichotomy presented in the RLA. Applying the rationale espoused in *BLE I* to the facts established in this matter, the court finds it appropriate to enter summary judgment at this juncture. In that regard, the court finds it appropriate to take judicial notice of the record in *BLE I*, especially the facts as found to exist by the court in that matter, in resolving the present motion for summary judgment. *See, Union Mechling Corp. v. United States*, 566 F.2d 722 (1977).

The evidence presented in *BLE I* established the terms of the agreement extant between the Brotherhood and the

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[1] Although the BN's motion requested dismissal of the complaint for failure to state a claim, pursuant to Rule 12(b), Fed.R.Civ.P., the court treats the motion as one requesting summary judgment.

BN regarding the means of detecting Rule G violations. The critical term of that agreement, found by the court in *BLE I* to have reached an implied contractual status, is the term requiring the existence of a modicum of evidence that a particular employee was operating under the influence of a prohibited substance, before a supervisor could conduct further investigation. For the identical reasons set forth in *BLE I*, the existence of that term precludes the BN from utilizing urinalyses on a random basis to detect Rule G violations. The BN's random use of urinalyses to detect violations would present a "major" dispute subject to the status quo provisions of 45 U.S.C. § 156. The subjection of an employee to a urinalyses on a random basis is not "arguably" justified by the terms of the implied agreement extant between the parties.

The complaint filed by the Brotherhood does not allege, however, that the use of urinalyses was done on a completely random basis. Rather, the complaint alleges that the BN subjects an employee to urinalysis when that employee is believed to have been involved in an operating rule violation. The question of whether the urinalyses practice is "arguably justified" by the implied agreement, regarding Rule G, found to exist between the Brotherhood and the BN in *BLE I* is not as clear cut as the question was with respect to the random use of drug detection dogs. In fact, based upon the pleadings and evidence of record in this matter, the court concludes the urinalyses practice challenged by the Brotherhood is "arguably justified" under the terms of the agreement extant between the Brotherhood and the BN.

Consequently, the court finds the present controversy to be a "minor" dispute within the meaning of the RLA. The minor nature of the dispute deprives this court of the jurisdiction necessary to grant the injunctive relief sought by the Brotherhood.

For the reasons set forth herein,

IT IS ORDERED that the defendant's motion for summary judgment be, and the same hereby is, GRANTED.

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

Nos. 85-2360, 85-2412

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, LODGE 16, *et al.*; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, GRAND LODGE, *et al.*,
Intervenors, Appellants,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Appellee.

Submitted May 12, 1986

Decided Oct. 1, 1986

Before ARNOLD, FAGG and WOLLMAN, Circuit Judges.

PER CURIAM.

This is a suit in equity for an injunction preventing the defendant, Burlington Northern Railroad Co., from putting into effect unilaterally certain methods for detecting drug use among its employees. In general, if a proposed practice by a rail carrier is a clear departure from the collective-bargaining agreement, a dispute over the practice is treated as a "major dispute" under the Railway Labor Act, and the carrier may not proceed without first negotiating with the employees' representative. But if the proposed practice is arguably justified by the collective-bargaining agreement (including settled past practices of the parties under the agreement), then a dispute is called "minor," and the carrier may proceed unilater-

ally, subject to an arbitration process before the National Railroad Adjustment Board.

This appeal involves two disputed proposed practices. First, the railroad wants to administer chemical drug testing to all employees who appear to be involved in any accident or other incident which seemingly stems from human error. Second, the railroad wants to administer similar tests to all employees who return to work after a furlough or similar absence. The District Court, 642 F.Supp. 41, held that the dispute over the first practice (post-incident testing) was minor. It therefore denied the injunction sought against the railroad's proposed initiation of this practice. But with respect to the second challenged practice (post-furlough testing), the Court held the dispute major and therefore granted the injunction.

Both sides appeal. The union seeks reversal of the denial of the injunction against post-incident testing. The railroad seeks reversal of the grant of the injunction against post-furlough testing.

As to the first issue, we affirm. As to the second, we reverse. The Court's reasons for these holdings are expressed in two opinions. An opinion by Judge Arnold, in which all Members of the Court join, explains our holding that the railroad may proceed with post-incident testing. An opinion by Judge Fagg, in which Judge Wollman joins, explains our holding that the railroad may proceed with post-furlough testing. Judge Arnold dissents from this latter holding.

The judgment of the District Court, insofar as it denied an injunction with respect to post-incident testing, is affirmed. Insofar as it granted an injunction with respect to post-furlough testing, the judgment is reversed, and the injunction is vacated and set aside.

It is so ordered.

ARNOLD, Circuit Judge, for a unanimous Court, concurring in part.

This case involves a dispute between the Burlington Northern Railroad Co. (BN) and the Brotherhood of Maintenance of Way Employees (employees or union) over BN's efforts to deal with drug and alcohol abuse on the job. In response to several serious accidents on the railroad, which were found to have been related to abuse of drugs on the job, BN began a program of mandatory drug testing of employees. Two aspects of this program are before us now: One is "post-incident testing," in which the company requires employees who are involved in accidents or other incidents in which human error could have been a factor to submit to urinalysis in order to determine whether alcohol or certain drugs are in their system. The other testing program involves addition of a drug screen to the standard urinalysis which is part of a required medical examination given to employees periodically and when they return from furlough. The employees take the position that both testing programs amount to major changes in working conditions and therefore should not be implemented without prior negotiation. The District Court [1] agreed with the union as to the drug screen in required medical examinations, and enjoined its use. However, the Court held that the company's program of post-incident testing was at most a minor change in working conditions and therefore denied the injunction sought by the employees against this practice. Both parties have appealed. As already noted, the Court affirms as to post-incident testing and reverses as to the required medical examination on return to work. This opinion gives our reasons for affirming as to post-incident testing.

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[1] The Hon. Donald E. O'Brien, Chief Judge, United States District Court for the Northern District of Iowa.

I.

For a number of years, BN has had among its operating rules a rule (which is uniform throughout the railroad industry) prohibiting employees from using, possessing, or being under the influence of alcohol or other drugs while at work or subject to duty. This rule, known as Rule G, reads as follows:

> The use of alcoholic beverages, intoxicants, and narcotics, marijuana, or other controlled substances by employees subject to duty, or their possession or use while on duty or on Company property, is prohibited. Employees must not report for duty under the influence of any alcoholic beverage, intoxicant, narcotic, marijuana, or other controlled substance, or medication, including those prescribed by a Doctor, that may in any way adversely affect their alertness, coordination, reaction, response or safety.

Designated Record (D.R.) at 217b. The prohibitions of Rule G are also incorporated in BN's safety rules. D.R. at 217a. Any on-duty employee found in violation of these rules is subject to suspension or discharge.

The District Court found that the accepted method of enforcing Rule G in the past had depended primarily on the watchfulness and sensory observation of supervisors. If a supervisor detected abnormal behavior in an employee which led the supervisor to suspect that the employee was working under the influence of alcohol or drugs, then the supervisor would report his suspicion to an officer of the railroad, who would conduct further investigation. In determining that an employee appeared to be under the influence, the supervisor would rely on how the employee walked, talked, or smelled as well as on other physical manifestations of impairment. In recent years the company began to use breathalyzer, blood-alcohol, and urinalysis testing in connection with its enforcement of Rule G. Prior to December 1984, however,

these tests were used only as a means for the employee to clear himself of an accusation that he was working while impaired. The BN policy in effect before that date stated in part:

> Intoxilator, breathalyzer, blood alcohol tests, or urinalysis may not be administered without probable cause. Probable cause exist [sic] only where there is an outward manifestation of intoxication. Examples of such outward manifestations include the odor of alcohol on the breath, slurred or thick speech, apparent loss of coordination, unsteady gait. If such probable cause exists, the employee should be offered the opportunity to submit to intoxilator, breathalyzer, blood testing, and/or urinalysis. Again, before the administration of any such test, the employee must sign a Consent Form. If the employee refuses to submit to such testing after a determination that probable cause exists, he or she should be taken out of service and charged with violation of Rule G.

D.R. at 144-45.

Beginning around December of 1984, BN modified its Rule G enforcement methods. It redefined the events which would trigger the use of chemical tests; it also began to use these tests, particularly urinalysis, as a primary means for establishing the posssibility of drug abuse in employees, whereas in the past the tests had been available as a means for employees to exonerate themselves of a charge of alcohol or drug abuse on the job. The revised policy allowed supervisors to screen employees for drug abuse not only when the employee showed physical manifestations of impairment, but also when the employee was involved in an accident, an on-the-job injury, a rule violation, or an unsafe act. D.R. at 201. When an accident or other incident involved more than one person and responsibility could not be attributed to a particular individual, the entire crew was to be subjected to urinalysis (whether or not any member of the crew showed

signs of intoxication or impairment). D.R. at 68. BN contracted with an outside laboratory for the performance of these urinalyses. Results of the tests were to be returned to the BN medical department. However, when the supervisor requesting the test had immediate need of the results, he was authorized to use local medical facilities which would report the results directly to him. D.R. at 202-03.

Dr. Michael A. Evans, the director of the laboratory hired by BN for urinalysis testing of employees, testified by affidavit and submitted exhibits explaining the purpose, accuracy, and techniques used in drug testing of urine. The primary method used is called the Enzyme Multiplied Immunoassay Technique (EMIT). This test is designed to detect the presence of certain drugs or their metabolites (breakdown products) in a urine sample. The test does not purport to measure intoxication or impairment. D.R. at 193. The EMIT test is highly accurate, producing no more than 5% false positives. The laboratory confirms positive results through use of a gas chromatography/mass spectrometry test (GC/MS), which is considered to be the most accurate available. Although Dr. Evans testified that the EMIT test was calibrated to screen for marijuana at a level above the lowest amount which will produce an effect in a human being (see D.R. at 173), he submitted as an exhibit material describing the EMIT process which indicated that the highly sensitive EMIT test could detect traces of the drug for as long as three weeks after its use and could on occasion produce a positive result in a "passive inhaler" (a person who had been exposed to marijuana smoke through another person smoking in the vicinity). See D.R. at 193. The District Court made no specific findings favoring either Dr. Evans's affidavit or his possibly contradictory exhibit.

These changes in post-incident testing were unilaterally imposed by BN in November of 1984 over the vigorous objections of the employees. They assert that there was

for a number of years a settled, established practice, understood and accepted by both BN and the union, that BN would be entitled to investigate for possible drug or alcohol abuse on the job only when an employee appeared, through observation, to be intoxicated or otherwise impaired. This appearance of impairment alone was sufficient cause to remove the employee from service pending further investigation. The employee could then choose to submit to breath, blood, or urine testing to prove that he was not under the influence. The employees argue that by broadening the definition of sufficient cause to include rule violations and on-the-job injuries, and by including within the suspect group all crew members regardless of whether they appear to be impaired, the railroad has lowered the threshold of suspicion far below the level contemplated by the parties' established past practice. They also object to the mandatory use of urinalysis in the post-incident investigation program. This objection seems to be of two parts: (1) formerly, objective testing was at the opinion of the individual employee if he wished to exonerate himself of a charge of substance abuse; refusal to submit to a test could result in citation for violation of Rule G because the employee had already manifested signs of impairment. Under the present policy, the test is mandatory; refusal to submit to the test is deemed au automatic violation of Rule G regardless of any actual evidence of impairment. (2) The employees strenuously insist that the urinalysis test by itself does not measure impairment; instead, it detects the mere presence of drugs or their end-products in the system, perhaps long after the impairment has worn off. They argue that by using urinalysis as a primary means of detecting possible Rule G violations (rather than as a test to confirm or refute apparent intoxication) the railroad has unilaterally changed the meaning of Rule G itself. Instead of prohibiting impaired performance on the job, it now punishes past exposure to drugs even if there is no effect on work performance. The employees see these changes as being con-

tractual in scope and therefore seek to have BN's action enjoined while negotiation runs its course.

BN agrees that there is an established course of conduct between the union and the railroad. It sees the past practice as having given BN the power to use reasonable means to investigate possible drug or alcohol abuse on the job whenever there appeared some evidence that an employee was violating Rule G. In the past, most of the violations involved drinking on the job or reporting drunk for work. Alcoholic intoxication manifests itself in physically apparent ways. The drunken employee may exhibit the odor of alcohol on his breath, may have slurred speech or a stumbling gait. When a supervisor notices an employee acting in a way which suggests intoxication, he has the power to remove the employee from service. Of course, the employee always has the opportunity to prove that he is not under the influence. This routine has been reasonably satisfactory in the past when the chief source of Rule G violations was alcohol. But the use or abuse of marijuana and other illegal drugs frequently does not produce an externally obvious state of impairment. The intoxicating effect of these substances is said to be primarily mental or emotional; a user's judgment or clearheadedness may be impaired without any obvious physical sign of intoxication. It is the insidious nature of these substances that too often the user's faculties are impaired and the damage done through a serious error on his part before he realizes that he is impaired and without any outward sign of his impairment that could lead a supervisor or other person to intervene. BN argues that in order to deal with the threat of serious incidents caused by drug abuse it is entitled to use all reasonable means which are available so long as it first has some cause to believe that the employee has abused drugs. The occurrence of a human-error accident or safety violation or on-the-job injury in which a failure of judgment has been a factor is, it says, sufficient cause to suspect that drug abuse may have been the cause and to initiate further

investigation. BN says that the principle is the same as under the former policy: that is, upon some cause for suspicion, the company is entitled to take the employee out of service and use reasonable means to investigate. Believing that this is at most a minor change in working conditions, BN unilaterally imposed the modified policy and submitted the dispute to the National Railroad Adjustment Board, which is the proper method for resolving minor disputes. Having done so, BN asserts that it has fully complied with the Railway Labor Act and that this Court is without jurisdiction to interfere.

II.

We deal first with the dispute as to post-incident testing. On this part of the case, the District Court essentially agreed with BN's view and accordingly denied the injunction sought by the employees. Since this case comes to us in the context of an appeal from the denial of a preliminary injunction, our power to review is limited to whether the trial court clearly erred in its characterization of the facts, made a mistake of law, or abused its discretion in considering the equities.

Relations between the union and the railroad company are governed by the Railway Labor Act, 45 U.S.C. §§ 151-188.[2] In recognition of the critical national importance of uninterrupted commerce by rail, the Act is designed to provide for the prompt and orderely settlement of both fundamental contractual disputes and of grievances between union and management, so as to avoid the disruption of commerce which would be occasioned by strikes or other means of self-help by either side. 45 U.S.C. § 151a. The Act imposes on both employees and the railroad the duty to negotiate whenever a dispute arises. 45 U.S.C. § 152 First, Second. However, beyond the initial stages

[2] BN argues in the alternative that the Railway Labor Act does not apply at all, that it has a "management prerogative" to put into effect unilaterally the proposed changes. We reject this position.

of negotiation, the Act distinguishes between "major" and "minor" disputes.[3]

For the major type of dispute, i.e., one which seeks to change the rates of pay, rules, or working conditions in a way not contemplated by the collective-bargaining agreement, the Act requires the parties to seek settlement through the noncoercive means of negotiation, mediation, voluntary arbitration, and conciliation before resorting to self-help. Major changes in the relation-

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[3] The terms "major" and "minor" are not found or defined in the Act, which speaks of "change[s] in agreements affecting rates of pay, rules, or working conditions," 45 U.S.C. § 156, as one kind of dispute, and of "disputes . . . growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions," 45 U.S.C. § 153(i), as another. The accepted distinction between major and minor disputes is found in *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U.S. 711, 65 S.Ct. 1282, 89 L.Ed. 1886 (1945). There, the Court said that major disputes are those which arise

> over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past. . . .
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> . . . [They are] the large issues about which strikes ordinarily arise with the consequent interruptions of traffic the Act sought to avoid.

Id. at 723-24, 65 S.Ct. at 1290. A minor dispute, on the other hand,

> contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. . . . [T]he claim is to rights accrued, not merely to have new ones created for the future.
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> . . . [Minor disputes] seldom produce strikes. . . .

Id. at 723-24, 65 S.Ct. at 1289-90 (footnote omitted).

ship between employees and the railroad may not be implemented unilaterally. See 45 U.S.C. § 156. In a minor dispute, on the other hand, minor changes in working conditions may be implemented while settlement is sought through arbitration before the National Railroad Adjustment Board. See 45 U.S.C. § 153.

The question whether a dispute is major or minor determines the degree to which a federal court may become involved in the dispute. If the dispute is major, the courts have broad powers to enjoin unilateral action by either side in order to preserve the status quo while settlement procedures go forward. Such an injunction may issue without regard to the usual balancing of the equities. *United Transportation Union v. Burlington Northern, Inc.*, 458 F.2d 354, 357 (8th Cir.1972). But if the dispute is only minor, the court's power is more limited since the NRAB has exclusive jurisdiction over such minor disputes. The traditional power to enjoin under equitable principles remains, but in the usual case it is inappropriate to exercise this power since irreparable loss and inadequacy of the legal remedy cannot plainly be shown until the NRAB has had an opportunity to act. See *Order of Railway Conductors v. Pitney*, 326 U.S. 561, 567, 66 S.Ct. 322, 325, 90 L.Ed. 318 (1946). In rare cases, however, an injunction may be necessary even in a minor dispute in order to preserve the jurisdiction of the NRAB, i.e., to keep the dispute from growing into a major one while the settlement process is under way. *Locomotive Engineers v. Missouri-Kansas-Texas Railroad*, 363 U.S. 528, 533-34, 80 S.Ct. 1326, 1329-30, 4 L.Ed.2d 1379 (1960). The court must take care, however, that its injunction does not serve to adjudicate the merits of the case, which remain within the jurisdiction of the NRAB until that tribunal has acted. *Ibid.*

Whether a dispute is major or minor depends on whether it is arguably comprehended within the agree-

ment of the parties. The court must first determine what that agreement is. Since, as a practical matter, it is impossible for the written collective-bargaining agreement to describe every possible permutation of working conditions which might arise, it is not unusual for the parties to a labor agreement to develop working relationships, customs, and practices which are understood to be the norm, but which are nowhere reduced to a formal contract term. When longstanding practice ripens into an established and recognized custom between the parties, it ought to be protected against sudden and unilateral change as though it were a part of the collective-bargaining agreement itself. Such practices have been described as the "actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose." *Detroit & Toledo Shore Line Railroad v. United Transportation Union*, 396 U.S. 142, 153, 90 S.Ct. 294, 301, 24 L.Ed.2d 325 (1969).

This Court has said that a dispute is minor if the agreement is "reasonably susceptible" of the interpretations sought by both the employer and the employees. *Independent Federation of Flight Attendants v. Trans World Airlines*, 655 F.2d 155, 158 (8th Cir.1981). Other courts have said that a dispute is minor if the employer's action can be arguably justified under the terms of the existing agreement, see, *e.g.*, *REA Express, Inc. v. Brotherhood of Railway, Airline, and Steamship Clerks*, 459 F.2d 226, 231 (5th Cir.), *cert. denied*, 409 U.S. 892, 93 S.Ct. 115, 34 L.Ed.2d 149 (1972), or that the dispute is minor unless the employer's argument that its actions are within the contract is "obviously insubstantial," see *Airlines Stewards & Stewardesses Association v. Caribbean Atlantic Airlines*, 412 F.2d 289, 291 (1st Cir. 1969). These locutions are essentially the same in their result. They illustrate the relatively light burden which the railroad must bear in showing that its

actions are at most minor changes and thus within the status quo.

III.

Applying these principles to the facts of the present case, we note that nothing in the collective-bargaining agreement refers in any way to Rule G or to enforcement or investigation methods. Nevertheless, we agree with the District Court that the union has long shared in BN's concern over the abuse of alcohol and drugs by employees on the job. Accordingly, the parties have acquiesced in certain detection and investigation methods over the years, and these practices may fairly be considered to have become the status quo. That being so, the railroad may not depart from these established practices in such a substantial way as to abrogate the implied contractual term which they represent. But so long as the railroad keeps within the bounds of this understanding, the employees are not entitled to an injunction against minor changes in method which are reasonably within the agreement.

The District Court found as fact that in the past BN had relied on the sensory observations of supervisors as its means of detecting Rule G violations, and that "such practice, which existed over a substantial period of time, became the only acceptable method of detection to both parties." *Brotherhood of Maintenance of Way Employees v. Burlington Northern Railroad*, No. [sic] 642 F.Supp. 41, *reprinted in* Appellant's addendum at 7 (N.D.Ia. 1985). This accepted method of detection applied only to alcohol-abuse problems, which have, until recently, been the major focus of concern of both parties. Underlying this detection method was the principle that BN could not or would not remove an employee from the job or investigate for possible substance abuse without some reason for suspecting that employee. In other words, there were no at-large screening of employees or random searches. The District Court described the threshold level of sus-

picion as a "modicum of evidence" without elaborating on what that meant. *Ibid.* We note that BN's legal counsel, in describing the established policy, stated that an employee could be removed from service pending further investigation upon a showing of "probable cause." D.R. at 144-45. We doubt that this term was intended in its usual criminal-law sense; there was evidence from which the District Court could reasonably have concluded that some lower quantum of suspicion was sufficient under the parties' established practice. *Cf. Brotherhood of Locomotive Engineers v. Burlington Northern Railroad*, 620 F.Supp. 163, 171 & n. 8 (D. Mont.1985), *appeal pending*, No. 85-4138 (9th Cir. argued July 8, 1986). (In a similar case challenging BN's drug-enforcement methods, the District Court used the term "modicum of evidence" and declined to speculate whether that term was more akin to "probable cause" or to "reasonable suspicion" as known in the criminal law.) Nevertheless, whatever the actual quantum of evidence the parties' past practice allowed, we find the record to be clear that suspicion must be particularized in one or more employees and must be based on something more solid than speculation or rumor before the railroad may act. The union's acquiescence in BN's past methods of enforcement was hardly intended or understood by either party to authorize a dragnet. See *Brotherhood of Locomotive Engineers, supra*, 620 F.Supp. at 171-72, invalidating a random-search policy.

The union does not deny that the railroad has the right to ensure the safety of its operations by removing from service any employee who is unable to perform his duties safely. The past practice of the parties shows that there has been little objection to the railroad's exercising this prerogative whenever common-sense observation of a particular employee suggested that the employee was impaired. Indeed, in the past no further testing or detection was necessary once a supervisor had

determined through observation that all was not well with the employee. What the railroad has done now is to add a more refined step, the urine test, to confirm the observation of the supervisor. Since the test can be required only upon some showing that the employee may be impaired, the ground rules between the union and the railroad have not changed significantly; suspicion of impairment is still required; instead of simply taking the suspected employee out of service, the railroad now seeks to confirm its suspicion before taking that step. We find no error in the conclusion of the District Court that this amounts, at the most, to only a minor change in working conditions. Accordingly, the Court properly declined to issue the status-quo injunction sought by the employees.

The policy that BN is thus left free to follow includes, in some circumstances, testing all the members of a crew. This will occur, however, only after an "incident" happens, and only when individual responsibility is not clear. BN's own statement of its policy emphasizes this point: "BN intends to continue implementing this policy in a common sense manner. For example, where individual responsibility is clear and other crew members are not involved in the action causing the incident, a urinalysis test should only be required of the individual crew member having such exclusive responsibility for the action triggering the incident." D.R. at 69. We do not understand BN's policy to permit testing on a less discriminating basis, and we express no view on whether a broader testing policy would be such a serious departure from past practice as to give rise to a major dispute.

To the extent that the District Court's order left BN free to implement its new post-incident testing policy, it is affirmed.

FAGG, Circuit Judge, joined by WOLLMAN, Circuit Judge, concurring.

To ensure the safety of its operations, BN seeks to eradicate on-the-job drug abuse. In response to the revelation that "several serious accidents on the railroad [were] related to abuse of drugs on the job," *ante* at 1017, BN has understandably expanded the scope of its post-incident testing as well as its periodic and return-to-work medical examination.

We agree that BN's post-incident testing program is a minor dispute within the context of these parties' collective bargaining agreement. It is also our view that addition of a drug screen to the routine urinalysis phase of an established medical examination program is a minor dispute.

BN's past practice of requiring employees to submit to periodic and comprehensive medical examinations in order to ensure all employees are fit for duty is not challenged. Indeed, the union does not deny BN "has the right to ensure the safety of its operations by removing from service any employee who is unable to perform his duties safely." *Ante* at 1023. Basically, all that is involved in the parties' dispute is the extent to which the urinalysis component of these examinations may be refined in order to predict safe employee performance.

It is beyond dispute the drug screen is a new technique; the underlying purpose of the medical examinations, however, remains the same—to ensure all BN employees are fit for duty. The drug screen is nothing more than a method designed to detect the presence of a newly emerging threat to that fitness.

The use of a more comprehensive urine test has not significantly changed the ground rules between BN and the union. It should come as no surprise to the parties that the components of a work fitness medical examination will change with the times. Because BN and the union are involved in a dispute over the scope of BN's

actions designed "to ensure that all employees are fit for duty"—actions which are arguably justified—this dispute should be submitted to the National Railroad Adjustment Board.

Accordingly, to the extent that the order of the District Court enjoined BN's proposed new medical-examination policy, it is reversed, and BN is free to proceed with this policy, as well as with post-incident testing.

ARNOLD, Circuit Judge, dissenting in part.

The second major issue arises out of BN's addition of a "drug screen" to the medical urinalysis which is a part of scheduled examinations given to employees on a periodic basis and when they return from extended absence or furlough. In the past, the railroad has required of employees a periodic and comprehensive medical examination in order to ensure that all employees are fit for duty. Recently, medical examinations have been extended to returning seasonal employees, those who work for part of the year and then are furloughed for three months or more. This examination has always included laboratory examination of urine and blood samples. The change of which the employees complain is the railroad's addition of the drug screen to this urinalysis. This new examination is universal and indiscriminate, in the sense that it is imposed without regard to any degree of suspicion that the employee is working while impaired. In this way it differs significantly from post-incident testing. There is no precedent in the relationship between employees and railroad for this sort of probing into the private behavior of employees, and the District Court did not clearly err in finding that in instituting such a regimen of testing without first requiring some showing of particularized suspicion the railroad was effecting a major change in working conditions.

The railroad argues that this program of indiscriminate testing is a necessary element of determining med-

ical fitness of employees. It asserts that the results of positive tests are kept strictly confidential and that employees who test positive are referred for counseling in the company's Employee Assistance Program but are not subject to removal from employment or other discipline. But as a practical matter, the fact that an employee has been sent to the Employee Assistance Program is no secret. The Employee Assistance Program is informed by the Medical Department of the positive drug-screen result; the employee's supervisor is aware that the employee is being counseled; failure to cooperate with the program results in medical disqualification regardless of whether the employee is "drug-dependent" or not. D.R. at 25. The railroad's program of universal drug-testing could result in the dismissal of an employee without any prior suspicion of his use of drugs. This is a major departure from the established practice between employees and railroad. Such a change cannot go forward without appropriate negotiations between the parties. The District Court acted properly under the Railway Labor Act by issuing a status-quo injunction prohibiting the railroad from proceeding with this portion of the program.

The railroad and the employees may ultimately come to an understanding that Burlington Northern's proposed method of medical intervention in employee drug-abuse problems is the best way of approaching this problem. However, that result must be reached through arm's-length bargaining between the parties, not through unilateral compulsion on the part of the railroad. Thus, I think the injunction issued by the District Court should remain in force pending negotiation of the major change proposed by the railroad.

From so much of this Court's action as reverses the order of the District Court, I respectfully dissent.

STATUTORY PROVISIONS OF THE RAILWAY LABOR ACT

§ 152. General duties

First. Duty of carriers and employees to settle disputes

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Designation of representatives

Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. Agreements to join or not to join labor organizations forbidden

No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agree-

ment promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. Conference of representatives; time; place; private agreements

In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such places of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden

No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Eighth. Notices of manner of settlement of disputes; posting

Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provision of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference,

influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. Violations; prosecution and penalties

The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his

labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

Eleventh. Union security agreements; check-off

Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a

condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First division of paragraph (h) of section 153 of this title defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however*, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the

organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further*, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended.

§ 153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

(a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of sections 151a and 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees or through an officer or officers designated for that purpose by such board, trustee or trustees or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one voting representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this

section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with sections 151a and 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of paragraph (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of eight members, four of whom shall be selected and designated by the carriers and four of whom shall be selected and designated by the labor organizations, national in scope and organized in accordance with sections 151a and 152 of

this title and which represent employees in engine, train, yard, or hostling service: *Provided, however*, That each labor organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the First Division or in the adoption of any award with respect to any dispute submitted to the First Division: *Provided further, however*, That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in the adoption of any award with respect to any dispute submitted to the First Division.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That except as provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided.

(*l*) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the

parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(*o*) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District

Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board; *Provided, however*, That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph

(p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(t) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in

carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after June 21, 1934, and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however*, That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this chapter, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this chapter and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such lim-

ited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (*l*) of this section, with respect to a division of the Adjustment Board.

Second System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards

Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is

hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

§ 156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be

agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

Civil Action No. CV-85-055-GF

HONORABLE PAUL G. HATFIELD

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Plaintiff,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Defendant.

JOINT STIPULATION OF FACTS

1. Plaintiff Brotherhood of Locomotive Engineers (BLE), an unincorporated association, is a railway labor organization which represents in collective bargaining the craft of locomotive engineers employed on virtually all of the nation's railroads, including Defendant BN, and is a "representative" of employees within the meaning of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*

2. Defendant Burlington Northern Railroad Company (BN) is a corporation duly qualified to do business in Montana, is engaged in the transportation of goods and commodities by rail in interstate commerce and is subject to the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* Both Plaintiff and Defendant are parties subject to the provisions of the Railway Labor Act.

3. At all material times and for many years, BN has had in effect a "Rule G," a safety rule, reading as follows:

> Rule G. The use of alcoholic beverages, intoxicants, narcotics, marijuana or other controlled substances by employees subject to duty, or their possession or use while on duty or on company property is prohibited. Employees must not report for duty under the influence of any marijuana or other controlled substances or medication, including those prescribed by a doctor, that may in any way adversely affect their alertness, coordination, reaction, response or safety.

4. Operating and safety rules of BN are binding on employees unless modified or restricted by the collective bargaining agreements.

5. None of the eight collective bargaining agreements currently in effect between BLE and BN contain any restriction on BN's right to enforce its operating and safety rules, including Rule G.

6. The use of marijuana, cocaine, controlled substances and alcohol is known to impair safe operation of trains and equipment.

7. Federal and state criminal laws prohibit the use and possession of marijuana, cocaine and other controlled substances.

8. Section 64-14-1004, Montana Statutes, makes it illegal for locomotive engineers, conductors, dispatchers or telegraph operators to be intoxicated while on duty.

9. At all material times and for many years, BN had in effect Rule 702(B) which relates to insubordination and reads as follows:

> Employees must comply with instructions from the proper authority.

10. Following two separate train collisions in April, 1984, resulting in the deaths of seven employees, BN intensified its Rule G enforcement policy.

11. Exhibit 1 is a true and correct copy of a letter dated April 23, 1984, sent to A. E. Egbers, BN's Vice President of Labor Relations, by R. E. Pelava, BLE General Chairman, in which BLE proposed two agreements concerning the prevention of alcohol and drug abuse. The first proposed agreement was referred to as a "Peer Referral Agreement" and was designed to encourage employees to refer abuser employees to rehabilitative help. The second proposed agreement was referred to as a "Rule G By-Pass Agreement" and was designed to permit abuser employees to bypass traditional discipline in exchange for rehabilitative help.

12. Exhibit 2 is a true and correct copy of a letter dated May 11, 1984, sent to all operating employees by Charles J. Bryan, BN's Senior Vice President of Regional Operations, concerning BN's intensification of its Rule G enforcement policy.

13. Exhibit 3 is a true and correct copy of a letter dated June 6, 1984, sent to C. J. Bryan by R. E. Pelava, BLE General Chairman.

14. Exhibit 4 is a true and correct copy of a letter dated June 29, 1984, sent by C. J. Bryan to R. E. Pelava in response to Mr. Pelava's letter dated June 6, 1984.

15. During the months of May through August, 1984, BN and BLE met on several occasions to discuss proposals for a "Peer Referral" and "Rule G By-Pass Agreement." The last such meeting took place on August 30, 1984, during which time BLE informed BN that BLE had filed a complaint in the U.S. District Court for the District of Montana to challenge BN's use of canine inspection teams. The complaint was captioned *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Company* and was docketed as Civil Action No. CV-84-213-GF.

16. After receiving knowledge that BLE had filed its complaint, the parties reached an agreement entitled

"Drug and Alcohol Abuse Prevention Program." Exhibit 5 is a true and correct copy of this agreement reached on August 30, 1984.

17. Exhibit 6 is a true and correct copy of a memorandum dated November 5, 1984, with an attached form entitled "Consent for Toxicological Test" sent to D. E. Baker, et al, from C. J. Bryan concerning BN's post-accident urine testing policy.

18. Exhibit 7 is a true and correct copy of a letter dated December 7, 1984 sent to C. J. Bryan, et al, from R. E. Pelava concerning BLE's objections to BN's post-accident testing policy.

19. After Pelava sent his December 7, 1984 letter to BN, discussions took place between Mr. Pelava and Mr. Dagnon, BN's Vice President-Labor, concerning BLE's objections to the new policy, the consent forms and specific incidents in which those employees represented by BLE had been subjected to discipline pursuant to BN's post-accident testing policy. These discussions, in part, led to the reinstatement of certain affected employees and to BN's issuance of a revised policy statement in a memorandum dated December 21, 1984, sent to W. W. Francis, et al, from C. J. Bryan. Exhibit 8 is a true and correct copy of the December 21, 1984 memorandum.

20. Under BN's present Rule G enforcement policy, employees are subject to post-accident urine testing in the following cases:

1. *Human Factor Accidents—Major*

   A. Major collisions involving more than one train or one switching movement.

2. *Human Factor Accidents—Minor*

   A. Derailments in yard or industry switching.

   B. Failures to respond to signals.

C. Run through switches or derail.

D. Failures to secure.

3. Cases in which a BN supervisory official detects any employee displaying abnormal behavior.

The post-accident testing policy applies only where there is a causal connection between the accident and an employee's responsibility for the accident. Post-accident testing is not required when the cause of the accident is clearly related to other than employee error—i.e., equipment failure.

21. In the event an employee becomes involved in any of the circumstances described in paragraph 20, the following statement is read to the employee:

> "THIS IS TO ADVISE THAT THIS INCIDENT MAY INVOLVE OPERATING RULE VIOLATIONS (OR, AS APPROPRIATE, ABNORMAL BEHAVIOR). UNDER BN'S EXISTING POLICY GUIDELINES, WE ARE REQUESTING THAT YOU GIVE A URINE SAMPLE TO BN, OR TO A DESIGNATED MEDICAL FACILITY IN ORDER TO EXONERATE YOURSELF FROM AN ALLEGED RULE G VIOLATION. THE URINE WILL BE USED TO DETECT THE POSSIBLE PRESENCE OF ANY DRUGS OR ALCOHOL IN YOUR BODY. WE SHOULD ALSO ADVISE YOU THAT A REFUSAL TO GIVE A URINE SAMPLE WILL BE CONSIDERED A VIOLATION OF RULE G AND 702B*."

22. Subsequent to the issuance of Mr. Bryan's November 5, 1984 memorandum, employees represented by BLE and other BN employees have been subjected to BN's post-accident testing policy, in accordance with the conditions outlined in paragraph 20, and are required to submit to mandatory urine testing for drugs and/or

alcohol due to their involvement in accidents where human causation is a factor. In addition, employees who have refused to submit to the mandatory post-accident testing have been charged with violation of Rule G and, in some instances, violation of Rule 702(B) and have accordingly been removed from service and disciplined pursuant to the disciplinary procedures outlined in the collective bargaining agreements and also, as subject to the procedures of the Railway Labor Act. In November and December, 1984, BN subjected 111 employees to its post-accident urine testing. Eighty-one percent of the employees tested had negative results, 9% positive and 9% declined to take the test.

23. On June 5, 1984, the Federal Railroad Administration (FRA) issued its notice of proposed rulemaking regarding "Control of Alcohol and Drug Use in Railroad Operations" (FRA Docket RSOR-6), Exhibit 9 is a copy of that FRA notice.

24. The FRA proposed rules were published in the *Federal Register* on June 13, 1984, (Volume 49, No. 114).

25. Among the proposed FRA rules is § 218.109 "Authority to Test for Cause." A copy of that section is identified as Exhibit 10.

26. On Friday, January 4, 1985, R. E. Pelava informed James B. Dagnon that BLE was no longer interested in further discussions regarding BN's post-accident testing policy and would take whatever appropriate action the BLE deemed advisable.

27. Exhibit 11 is a true and correct copy of a "Notice of Intent to File an Ex Parte Submission" dated January 7, 1985, which was sent to Nancy Dever, Executive Secretary, National Railroad Adjustment Board, by James B. Dagnon.

28. On February 7, 1985, BN filed its submission to the First Division of the National Railroad Adjustment

Board (NRAB), which the Board docketed as B-1812. Exhibit 12 is a true and correct copy of BN's submission (less attached exhibits).

29. BLE's opening submission to the NRAB in Docket B-1812 was originally due on March 7, 1985. BLE requested and was granted an extension for the filing of its submission until April 6, 1985.

/s/ Richard J. Schreiber
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

Civil Action No. CV-85-055-GF

HONORABLE PAUL G. HATFIELD

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Plaintiff

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Defendant

AFFIDAVIT OF CHARLES J. BRYAN

My name is Charles J. Bryan and I am a resident of Overland Park, Kansas. I am employed by Burlington Northern Railroad Company (BN) as Senior Vice President-Regional Operations, with offices at 9401 Indian Creek Parkway, Overland Park, Kansas.

In that capacity, it is my responsibility to oversee the day-to-day train operations on BN with the highest priority to safety and efficiency of such operations. In that respect, it is essential that such train operations be conducted in accordance with company operating rules which are designed to assist in meeting this objective.

I have reviewed and am familiar with the allegations and/or facts involved in those matters described in the Brotherhood of Locomotive Engineers' (BLE) complaint for preliminary injunction filed in the above-captioned case, as well as their memorandum in support of a motion of March 7, 1985, and the supporting affidavit of R. E. Pelava. I am personally aware that BN has utilized compulsory urine testing to determine Rule G violations since at least 1978 and issued appropriate discipline, where justified, subject to the grievance process provided for in collective bargaining agreements and the Railway Labor Act.

If called to testify as a witness, I can completely testify to the following facts:

1. BN is the nation's largest railroad in terms of track mileage, operating through 29 states and in two Canadian provinces. BN, in addition to its freight service, operates extensive passenger service, including Amtrak operations throughout the western United States as well as a major commuter service in Chicago. As part of its freight operations, it transports hazardous materials in interstate commerce. Clearly, this necessitates the highest degree of attention to safety of train operations. Indeed, public safety is of paramount interest to BN for its employees, rail passengers as well as the general public.

2. There exists throughout the railroad industry, including BN, a safety operating rule known as Rule G which prohibits the use or possession by an employee of drugs or alcohol while on duty or on company property and further prohibits an employee from reporting to duty while under the influence of any drug or alcohol.

3. Historically, BN has used various means and procedures to enforce Rule G and has never negotiated with the BLE or any other union regarding its enforcement of operating rules, including Rule G, since they are not

part of any collective bargaining agreement but have always been unilaterally promulgated by the carrier. Among the past practices used to enforce Rule G has been the utilization of post-accident testing including the use of urine, blood or breath test. For example, during the period from January 1, 1981, through March 1, 1984, testing had been an essential feature of BN's enforcement program and approximately 100 BN employees were subjected to discipline based on test results, including 13 engineers. Attached as Exhibit 1 is a listing of those employees who were subjected to such testing with positive results. Obviously, this does not include a much greater number of BN employees who were also tested during the same period where the results were negative. During this period, BLE registered no objections to BN's testing practices.

4. As a result of two catastrophic train accidents in the spring of 1984, BN intensified its program of Rule G enforcement practices, including compulsory urine testing based on just cause or reasonable suspicion standards, after an accident where there were indications of human causal factors related to the accident. BN's current post-accident testing program is fully described in my memorandums of November 5, 1984, and December 21, 1984, true and accurate copies being attached hereto as Exhibits 2 and 3, respectively.

5. The results from the intensification of BN's post-accident testing policy since November 2, 1984 are summarized on Exhibit 4, attached hereto, which reflects post-accident testing of 329 employees during that time frame. Seventy-six percent of the tests were negative, 13% positive and 6% of the employees declined to take the test.

6. BN's post-accident testing program is similar to programs being conducted on other railroads. I am BN's member on the OT General Committee of the American

Association of Railroads (AAR) and, in that capacity, receive data regarding drug and alcohol problems within the railroad industry. For example, I recently received a copy of a letter from Mr. Lacy, Southern Pacific's Vice President of Operations, dated January 30, 1985, transmitting a letter from Southern Pacific's (SP) Chairman McNear to FRA Administrator Riley. Mr. McNear's letter included a summary of the results of the SP's post-accident testing program since their intensification of the program commenced in the summer of 1984. It is interesting that their results closely parallel BN results, with 400 post-accident tests conducted on the SP resulting in 61 positive tests and 14 refusals of employees to take the test. The SP totals of positive tests and refusals to take the test also approximate 18% of the total tests conducted. A copy of Mr. Lacy's letter is attached as Exhibit 5.

7. BN's dramatic reductions in accident costs are even recognized by the BLE. For example, Exhibit 19 to Mr. Pelava's affidavit reflects these results for recent months after intensification of BN's post-accident testing policy, pursuant to my November 5, 1984 memorandum. More recent data for January and February, 1985 v. 1984 indicate a continuation of this trend. BN's accident cost per train mile for January and February, 1985 was reduced 28% over costs for the comparable period in 1984. (.05 v. .07). While Mr. Pelava seeks to attribute BN's reductions in accident costs solely to the Rule G Peer Referral Program, an objective evaluation of the facts clearly indicates otherwise, i.e., only eight BN employees have participated in such programs to date, including one BLE member and seven UTU members. As BN, SP has also registered dramatic reductions in human factor accidents since intensification of its post-accident testing program in the summer of 1984. The most recent data (January, 1985 v. January, 1984) indicates a drop of 53% in human factor accidents. (Exhibit 5). The SP also directly attributes these reductions,

primarily, to their intensified Rule G enforcement policies.

8. Both the BN and SP testing programs are very similar to the proposed FRA regulations on just cause standards for requiring post-accident testing. Attached as Exhibit 6 is § 218.109 of those proposed regulations ("Authority to Test for Cause"). And, in some respects, they are even more expansive than BN and SP's existing policies.

9. In Mr. Pelava's affidavit (¶¶ 11-14) he cites alleged abuses in implementation of BN's post-accident testing policies and transcript references of investigation proceedings involving charges pursuant to the post-accident testing policy. Obviously, in a railroad the size of BN, there will be examples of local misapplication of company policies. However, as indicated in my November 5, 1984 memorandum and reiterated in my December 21, 1984 memorandum, it is BN's intent to implement this policy in a common sense manner. It is and will continue to be BN's policy to correct any isolated misapplication of those policies by its line officers.

10. Mr. Pelava also contends in his affidavit that BN has never assessed discipline for refusing to take urine or blood tests (¶ 7) and that prior to November, 1984, BN enforced Rule G only through visual observation (¶ 6). Mr. Pelava is incorrect in both of these assumptions. I am personally aware of the fact that BN enforced Rule G through testing procedures and the purpose of my November 5 directive was to intensify the testing program to cover all human factor accidents as well as operating rule violations. I am also personally aware of many incidents, predating my November 5 directive, where employees were charged with Rule G and Rule 702(B) violations for refusal to take blood or urine tests.

11. It is my opinion that the facts document that BN's past practices have included post-accident testing and the intensification of such procedures is an essential tool in maintaining a safe working environment on this railroad. It is also my opinion that the facts document that intensification of reasonable Rule G enforcement policy, including post-accident testing, has a direct and positive effect on enhancing safety of train operations.

12. I enthusiastically support BN's Rule G Peer Referral and By-Pass Program but in order to maximize the effectiveness in combating the drug and alcohol problem on this railroad, it requires a two-pronged effort—i.e., reasonable and effective enforcement as a deterrent *plus* a Peer Referral and Rule G By-Pass Program.

13. It is my further opinion that any dispute or controversy between BLE and BN regarding the implementation of BN's post-accident testing program can readily be resolved pursuant to the mandates of the Railway Labor Act. We stand ready, willing and able to discuss any problems regarding implementation of the policy and if unresolved between the parties to submit it to binding arbitration as prescribed in the Railway Labor Act. It is my understanding that our Labor Relations Department has submitted the issue of BN's post-accident testing policies to the National Railroad Adjustment Board for arbitration. Pending such resolution by the NRAB, I believe it is essential that the paramount public interest in safety of train operations dictates that what has been a documented successful program not be thwarted pending such arbitration decision.

/s/ Charles J. Bryan
CHARLES J. BRYAN

BRYAN EXHIBIT

DATE	NAME	POSITION	LOCATION	TYPE OF TEST		RESULTS
9-19-81	Tim O'Keefe	Carman	Guernsey, Wyo.	Urine	Drug	Positive
11-26-81	Elizabeth Ballard	Laborer	Alliance, Neb.	Urine	Drug Alc.	Unknown
8-15-—	R.D. Leenerts	Brakeman	Alliance, Neb.	Breath	Alc.	.151
7-19-81	N.L. O'Dell	Engineer	Alliance, Neb.	Urine	Drug	Positive-THC
7-19-81	L.C. Miller	Brakeman	Alliance, Neb.	Urine	Drug	Positive-THC
8-19-81	James Baur	Fireman	Alliance, Neb.	Urine	Drug	Positive-THC
6-4-81	Barry Montgomery	Carman	Pensacola, Fla.	Blood & Urine	Drug Alc.	Unknown
6-30-81	Paula Miller	Clerk	Alliance, Neb.	Breath	Alc.	.104
3-31-81	M.R. Shadley	Track Laborer	McCook, Neb.	Breath	Alc.	.074
3-7-81	Robert Sweet	Brakeman	Pasco, Wash.	Blood	Alc.	Unknown
2-27-81	L.C. White	Switchman	Ft. Smith, Ark.	Breath	Alc.	.11
3-9-81	Steve Shiets	Engineer	Alliance, Neb.	Blood	Alc.	.04
3-4-81	M.L. Johnson	Brakeman	Alliance, Neb.	Breath	Alc.	.067
1-14-81	G.A. Lawson	Conductor	Alliance, Neb.	Blood	Alc.	.001
11-18-80	Harold Prince	Accounts Receivable Clerk	Denver, Colo.	Blood	Alc.	Unknown
9-17-—	Alan Lichti	Laborer	Minden, Neb.	Blood & Urine	Drug Alc.	Negative Drug; Bac. .13

BRYAN EXHIBIT—Continued

DATE	NAME	POSITION	LOCATION	TYPE OF TEST		RESULTS
9-1-82	Roy Bennett	Repairman-Water Service	Guernsey, Wyo.	Urine	Drug Alc.	Positive THC; Bac. .08
9-6-82	Jesse Gilmore	Switchman	Denver, Colo.	Blood	Alc.	.06
8-21-82	John Scheidt	Engineer (Amtrak #6)	Akron, Colo.	Breath	Alc.	Positive
8-21-82	Tom Witlam	Fireman (Amtrak #6)	Akron, Colo.	Breath	Alc.	Positive
7-30-82	Terry Serke	Machine Operator	Dewey, S.D.	Blood & Urine	Drug Alc.	Blood-Neg. Pos.-THC.
4-2-82	Peter Netland	Clerk	Duluth, Minn.	Blood	Alc.	.302
10-21-82	Hal Myers	Engineer	Centralia, Ill.	Breath	Alc.	.00 Neg.
3-21-82	John Goutz	Machinist	Springfield, Mo.	Blood	Alc.	.02
3-7-82	David Okasmit	Brakeman	Gillette, Wyo.	Blood	Alc.	.160
12-18-81	Edward Smith	Carman	Alliance, Neb.	Urine	Drug	Positive-THC
11-21-81	Lynn Brown	Carman	Alliance, Neb.	Urine	Alc.	Unknown
12-8-81	Marvin Rose	1st Class Mechanic	Ansley, Neb.	Urine	Drug	Positive-THC, Cocaine
12-4-81	Ronald Taylor	Truck Driver	Alliance, Neb.	Urine	Drug Alc.	Positive-THC
12-4-81	Pat Webster	Laborer	Alliance, Neb.	Urine	Drug Alc.	BAC .25

12-4-81	Terry Webster	Camp Tender	Alliance, Neb.	Urine	Drug Alc.	BAC .33
12-4-81	Dave Denesia	Laborer	Alliance, Neb.	Urine	Drug Alc.	Positive-THC
12-4-81	Stanley Beeken	Laborer	Alliance, Neb.	Urine	Drug Alc.	Positive-THC
12-4-81	Gregg Hagen	Laborer	Alliance, Neb.	Urine	Drug Alc.	Positive-THC
8-21-81	J.P. Schomoner	Engineer	Crawford, Neb.	Urine	Drug Alc.	Positive-THC
8-21-81	T.M. Julius	Conductor	Crawford, Neb.	Urine	Drug Alc.	Negative
8-21-81	L.S. Mentle	Brakeman	Crawford, Neb.	Urine	Drug Alc.	Positive-THC
8-21-81	R.J. Herrman	Brakeman	Crawford, Neb.	Urine	Drug Alc.	Positive-THC
9-3-81	P.M. Dinovo	Electrician	Alliance, Neb.	Blood	Alc.	Unknown
11-5-81	Dennis Frammell	Brakeman	Alliance, Neb.	Urine	Drug	Positive-THC
10-30-81	Daniel Taylor	Coach Cleaner	Alliance, Neb.	Urine	Drug	Positive-THC
10-30-81	George Schaneman	Carman	Alliance, Neb.	No Test - Refused		—
11-15-81	John Clackley	Electrician	Alliance, Neb.	Urine	Alc.	Unknown
11-13-81	Sherman Lenhart	Laborer	Alliance, Neb.	Urine	Alc.	Unknown
10-3-81	Steven Hoff	Machinist	Alliance, Neb.	Urine	Drug	Unknown
10-3-81	Sam Brisby	Laborer	Alliance, Neb.	Urine	Drug	Unknown
8-12-82	Jackie Richards	Machinist	Livingston, Mt.	Breath	Alc.	Positive
7-25-82	Erwin Sample	Engineer	Alliance, Neb.	Urine	Alc.	.08

BRYAN EXHIBIT—Continued

DATE	NAME	POSITION	LOCATION	TYPE OF TEST		RESULTS
7-31-82	Steven Vasely	Engineer	Alliance, Neb.	Urine	Alc.	.177
7-23-82	Clarence Sweet	Brakeman	Alliance, Neb.	Urine	Drug Alc.	Unknown
5-6-82	James Marshalek	Machinist	Superior, Wisc.	Blood	Alc.	Unknown
4-16-82	Andrew Brown	Lift Truck Operator	Cicero, Ill.	Blood	Alc.	.322
6-26-82	Cecil Tiger	Carman	Tulsa, Okla.	Blood	Alc.	.183
2-16-82	Charles Writer	Welder	Ft. Smith, Ark.	Breath	Alc.	.23
9-13-81	Ron Stewart	Engineer	Springfield, Mo.	Blood	Alc.	.18
10-14-82	Karl W. Meass	First Class Carpenter	Missoula, Mt.	Blood	Alc.	.126
1-3-83	Gordon Kupka	Conductor	Springfield, Mo.	Blood	Alc.	Unknown
1-27-—	Jerry Cheek	Carman	Springfield, Mo.	Blood	Alc.	Hosp. Would Not Release
1-24-—	Tommy Roof	Engineer	St. Joseph, Mo.	Blood & Urine	Drug Alc.	Unknown
10-10-83	James Rayburn	Switchman	N. Kansas City, Mo.	Blood	Alc.	Unknown
2-3-84	Leon Young, Sr.	Brakeman	Kansas City, Mo.	Blood	Alc.	.261
12-27-82	Gary Blandheim	Carman	Seattle, Wash.	Blood	Alc.	Unknown
1-21-83	Chris Kionle	Drawbridge Op.	Portland, Ore.	Urine	Alc.	Unknown
1-26-84	Daniel Shea	Engineer	Spokane, Wash.	Blood	Alc.	.095
11-8-83	W.J. Everson	Brakeman	Galesburg, Ill.	Blood	Alc.	.174

1-28-84	Joseph Gallegos	Crane Operator	Cicero, Ill.	Blood	Alc.	.231
6-2-83	Kirt Slack	Conductor	Alliance, Neb.	Urine	Drug	Positive-THC
6-2-83	Brian Crouch	Brakeman	Alliance, Neb.	Urine	Drug	Positive-THC
5-20-83	John Connors	Track Dept. Laborer	Denver, Colo.	Blood & Urine	Drug Alc.	Negative-Drug; BAC .052
3-9-83	Terry Davis	Brakeman	Gillette, Wyo.	Breath	Alc.	.156
7-2-83	Maurice Skerfficus	Engineer	Lincoln, Neb.	Blood	Alc.	.262
8-2-83	Robert S. Rogers	Travelling Mechanic	Ft. Laramie, Wyo.	Breath	Alc.	.185
8-16-83	Brenda Sullivan	Crew Caller	Gillette, Wyo.	Blood & Urine	Drug Alc.	BAC .102; Drugs-Positive
8-28-83	David L. Brass	Truck Driver-Steel Gang	Alliance, Neb.	Urine	Drug	Unknown
8-28-83	Max Popper	Truck Driver-Steel Gang	Alliance, Neb.	No Test - Refused		
8-28-83	D. L. Rundle	Ass't Foreman-Steel Gang	Alliance, Neb.	No Test - Refused		
5-20-83	Wayne Bernhardt	Engineer (Train #122)	Alliance, Neb.	Urine	Drug Alc.	Positive-THC & Alc.
5-20-83	Jim Osborne	Brakeman (Train #122)	Alliance, Neb.	Urine	Drug Alc.	Positive-THC & Alc.
5-20-83	R. W. Mullanix	Conductor (Train #122)	Alliance, Neb.	No Test		
5-20-83	T. B. Horsham	Brakeman (Train #122)	Alliance, Neb.	Urine	Drug Alc.	Negative
8-1-83	Ed C. Coynar	Conductor	Gillette, Wyo.	Breath	Alc.	.047

BRYAN EXHIBIT—Continued

DATE	NAME	POSITION	LOCATION	TYPE OF TEST		RESULTS
11-7-83	J. L. Thompson	Car Inspector	Amarillo, Tex.	Blood	Alc.	.137
3-23-83	Louie Moser	Foreman of Cars	Lincoln, Neb.	Blood	Alc.	.133
8-16-83	Patti M. Wilde	Brakeperson	Guernsey, Wyo.	Urine	Alc.	.15
8-16-83	Jon A. Kershner	Brakeman	Guernsey, Wyo.	Urine	Alc.	.20
8-5-83	Jack Streich	Switchman	Denver, Colo.	Blood & Urine	Alc.	Unknown
11-29-83	F. E. Green	CTC Maintainer	Glendo, Wyo.	Urine	Alc.	.09
3-2-84	R. W. Russell	Brakeman	Gillette, Wyo.	Breath	Alc.	.043
3-1-84	J. R. Kenley	Brakeman	Gillette, Wyo.	Breath	Alc.	.110
3-1-84	D. R. Olson	Brakeman	Gillette, Wyo.	Breath	Alc.	.017
3-1-84	G. E. Sederberg	Engineer	Gillette, Wyo.	Breath	Alc.	.082
9-23-83	Donald Bloom	Claims Investigator	St. Paul, Minn.	Blood	Alc.	.08
11-19-83	Darrell Fluggs	Section Laborer	Staples, Minn.	Blood	Alc.	Unknown
1-25-83	David Kirshner	Laborer-Diesel Shop	Minneapolis, Minn.	Blood	Alc.	.25
10-29-82	John D. Lacy	Carman	Tulsa, Okla.	Blood	Alc.	.036
12-5-82	Jim Skellenger	Laborer	Vancouver, Wash.	Urine	Drug	Positive-THC
12-5-82	Lou Schinging	Laborer	Vancouver, Wash.	Urine	Drug	Negative
12-5-82	William Shuste	Laborer	Vancouver, Wash.	Urine	Drug	Positive-THC
8-29-82	William Kelly	Brakeman	Klamath Falls, Ore.	Blood	Alc.	.24
12-16-82	Bruce Dieteich	Brakeman	Alliance, Neb.	Blood	Alc.	.314

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

Civil Action No. Civ-85-055

Honorable Paul G. Hatfield

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Plaintiff

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Defendant

STATE OF TEXAS
COUNTY OF TARRANT

AFFIDAVIT OF JAMES B. DAGNON

My name is James B. Dagnon and I am employed by Burlington Northern Railroad Company (BN) as Vice President-Labor Relations with offices at 3000 Continental Plaza, 777 Main Street, Fort Worth, Texas 76102.

It is my responsibility as BN's senior corporate labor relations officer to represent the Company in labor relations matters between the carrier and the representatives of its employees. BN employees are currently represented

by 17 different labor unions, including, among others, the Brotherhood of Locomotive Engineers (BLE).

In that capacity, I am familiar with the allegations and/or facts involved in those matters described in the BLE's complaint filed in this case. I have also reviewed the BLE memorandum of March 7, 1984, in support of their motion for preliminary injunction and the supporting affidavit of R. E. Pelava.

If called to testify as a witness, I can competently testify to the following facts:

1. Relations between rail carriers and unions are governed by the Railway Labor Act (45 U.S.C. § 151, et seq.). One of the prime mandates of the Railway Labor Act (RLA) is the directive of Section 2, First (45 U.S.C. § 152, First) that disputes between the carrier and the representatives of its employees are, if at all possible, to be resolved peacefully commencing with voluntary conferencing of disputes between the parties and concluding with binding arbitration. This particular statutory scheme was designed to avoid potential disruptive interruptions of interstate commerce.

2. In this case, BLE is seeking to enjoin BN's policy of requiring post-accident urine testing of employees when there is just cause or reasonable grounds to suspect that the accident or incident was caused by employee error involving a violation of the Company's operating rules. The parameters of this program are detailed in Mr. Bryan's affidavit.

3. On December 7, 1984, Mr. R. E. Pelava, one of the four BLE General Chairmen representing BN employees, directed a joint letter to Messrs. Bryan, Matthews (BN's Senior Vice President, Employee Relations) and myself (Pelava) expressing concerns about the implementation of BN's post-accident testing policy. I interpreted Mr. Pelava's letter to constitute a threat to take action against BN unless the post-accident testing program was discontinued or modified. It was my belief that some of

the concerns expressed by Mr. Pelava were the result either of a misunderstanding of BN policy implementation or a possible misapplication of the policy by local BN supervisory officers.

4. In an effort to peacefully resolve the dispute concerning the interpretation of BN's policy, I, along with Mr. Ratcliff (BN's Assistant Vice President-Labor Relations), conferenced with Mr. Pelava in Denver, Colorado, on December 17, 1984. This discussion regarding the post-accident testing policy was undertaken to see whether it could be resolved by further voluntary conferencing between the parties, or arbitration pursuant to the statutory mandate of Section 83, First of the RLA (45 U.S.C. § 153 First), prior to any further action by BLE. Mr. Pelava indicated to me that he would study the issue further and agreed to pursue a voluntary conferencing of the dispute at a future meeting prior to commencing any action against BN.

5. Later in December, 1984, the other BLE General Chairmen representing BN employees expressed concerns similar to those of Mr. Pelava regarding the implementation of BN's post-accident testing policy. I personally contacted each of the BLE General Chairmen by phone indicating that it was BN's desire to seek a peaceful resolution of this interpretation question via the conferencing process or through the arbitration process. All three of the other BLE General Chairmen orally agreed not to launch any action against BN until further conferences could be held in an effort to peacefully resolve this dispute.

6. During all these discussions, I indicated a willingness to deal with any legitimate concerns regarding policy implementation or local isolated misapplications of that policy and, absent a voluntary resolution of the dispute, to submit the dispute under the normal arbitration process mandated by the RLA, or, if desired, for expedited arbitration handling by the National Railroad Adjustment Board (NRAB) or a public law board. At

that point, I was reasonably confident that continued efforts for a voluntary resolution of this minor dispute through the conferencing process was the preferred avenue by both BN and the BLE. However, on Friday, January 4, 1985, while I was in St. Paul, Minnesota, I was contacted by Mr. Pelava and advised that the BLE was no longer interested in a peaceful resolution of this dispute through the conferencing process.

7. BN's program to eliminate or minimize drug or alcohol abuse by its employees involves overriding considerations of public safety and the vital public interest in safety of train operations. It is BN's position that post-accident testing is based on a just cause and reasonable suspicion standard and is an essential feature in that policy program. Therefore, since the voluntary resolution of this dispute through the conferencing process was foreclosed by the BLE's notice of January 4, it was decided that BN should take the initiative and progress resolution of this dispute by invoking the arbitration provisions of the RLA and submit such dispute for handling by the NRAB pursuant to Section 3 of the Railway Labor Act (45 U.S.C. § 153). BN filed its notice of intent to submit such dispute for arbitration with the NRAB in Chicago on the morning of January 7, 1985. On February 6, 1985, BN filed its formal submission to the NRAB regarding this dispute, a copy of which is identified as a joint exhibit. BLE's submission was due to be filed with the NRAB on March 7, 1985, but they requested and were granted an extension of time for their filing.

8. I personally contacted Mr. Pelava and the other three BLE Chairmen on Saturday, January 5, and Sunday, January 6, and advised them of BN's intent to submit the dispute to arbitration with the NRAB in Chicago on Monday morning, January 7. I requested they join with us in seeking expedited arbitration, but they declined to do so.

9. In Mr. Pelava's affidavit (§§ 10 and 14) he makes reference to his concerns about changes in BN's policy implementation and of examples of local misapplication of the policy by BN's supervisory officers. This, of course, is consistent with my position that BN was willing to conference any such disputes and, if justified, correct any incidents which arose out of local misapplication of BN's post-accident testing policy or to consider changes in the implementation of the policy proposed by Mr. Pelava. As a result of my discussions and conferences with him, BN did correct any incidents of local misapplication of policy cited in § 14 of Pelava's affidavit. We also did, as indicated in § 10 of Pelava's affidavit, eliminate use of consent forms, replacing them with an oral warning.

10. I am familiar with the eight collective bargaining agreements currently in effect between BLE and BN. None of these agreements contain any limitation or restriction of BN's right to enforce its operating or safety rules. Absent such restrictions, or a pending effort to negotiate such restriction pursuant to a valid Section 6 notice, any dispute regarding the interpretation of existing agreements is a "minor" dispute under the RLA. That is why we submitted it for binding arbitration to the NRAB.

11. It is my opinion that the current BLE efforts to enjoin BN's post-accident testing program would totally negate any effective enforcement efforts by BN regarding its Rule G policy and would circumvent the statutory mandate of the Railway Labor Act that all such disputes be resolved either by voluntary conferencing between the parties or binding arbitration by the NRAB.

12. BLE is currently progressing grievances of employees disciplined for Rule G violations pursuant to BN's post-accident testing policy.

/s/ James B. Dagnon
JAMES B. DAGNON

THE STATE OF TEXAS
COUNTY OF TARRANT

SUBSCRIBED AND SWORN TO BEFORE ME this 15th day of March, 1985.

/s/ Patricia Ann Taylor
Notary Public

My Commission Expires: September 7, 1985

BURLINGTON NORTHERN RAILROAD

Overland Park, Kansas
November 5, 1984

PERSONAL AND CONFIDENTIAL

Messrs. D. E. Baker
R. E. Buchanan
W. W. Francis
W. A. Hatton
D. W. Scott
W. A. Thompson

In an effort to minimize and/or eliminate the prohibited use of alcohol and drugs on Burlington Northern property, the following is a restatement and amplification of BN's existing policy defining when "probable cause" exists sufficient to require urinalysis tests to detect possible Rule G violations by BN operating employees.

Action should be taken to send either (1) the entire crew or (2) individuals, when responsibility is clearly identified, to a clinic for a routine urinalysis sample in the following cases:

1. *Human Factor Accidents—Major*

   A. Major collisions involving more than one train or one switching movement.

2. *Human Factor Accidents—Minor*

   A. Derailments in yard or industry switching.

   B. Failures to respond to signals.

   C. Run through switches or derail.

   D. Failures to secure.

3. Cases in which a BN supervisory official detects any employee displaying abnormal behavior.

We want to emphasize that BN intends to continue implementing this policy in a common sense manner. For example, where individual responsibility is clear and other crew members are not involved in the action causing the incident, a urinalysis test should only be required of the individual crew member having such exclusive responsibility for the action triggering the incident. The Division Superintendent must have close involvement and it is mandatory that he sanction these tests. It is also essential that the "probable cause" requiring the urinalysis test be adequately documented along with the identity of the supervisory official requesting it.

It is to be emphasized that continued implementation of BN's existing policy in this regard will be fairly and equally applied. Further, no employees submitting to a urinalysis test will be removed from service pending test results unless there are other circumstances requiring their removal from service. If the urinalysis tests are positive, the employee should be removed from service pending investigation.

In accordance with existing policy guidelines, when it is determined that a urinalysis test is required, the attached consent form should be used. Should any clarification of this policy be needed, contact T. C. Whitacre of my office.

/s/ C. J. Bryan
C. J. BRYAN

Attachment

cc: Messrs. W. A. Drexel
T. J. Matthews
E. J. Currie
H. P. Burton

1107/1106

EXCERPTS FROM THE FEDERAL REGISTER

49 Fed. Reg. 24300-02 (June 12, 1984)

§ 218.105 Post-accident toxicological testing.

(a) *Mandatory testing procedures.* (1) Following each accident and incident described in paragraph (b) of this section, the railroad (or railroads) shall take all practical steps to assure that all covered employees of the railroad directly involved in the accident or incident provide blood and urine samples for toxicological analysis by FRA. Such employees shall specifically include the operating employees responsible for any train or switching movement involved in the accident or incident.

(2) Every reasonable effort shall be made to assure that samples are provided as soon as possible after the accident or incident. This paragraph shall not be construed to inhibit the employees required to be tested from performing, in the immediate aftermath of the accident or incident, any duties that may be necessary for the preservation of life or property. However, where practical, the railroad shall utilize other employees to perform such duties.

(3) Samples shall be obtained, preserved, marked, handled, and made available to FRA under such procedures (consistent with this subpart) as the Associate Administrator for Safety, FRA, shall prescribe.

(4) Where practical, employees shall be transported to a health care facility independent of the railroad company, such as a hospital, clinic, or physician's office, where the samples shall be obtained. In all cases blood shall be drawn only by a qualified medical professional or by a qualified technician subject to the supervision of a qualified medical professional. In seeking the cooperation of a medical facility in obtaining a sample under this subpart, the railroad shall, as necessary, make specific reference to the requirements of this subpart.

(5) (i) In the case of an injured employee, the railroad shall request the treating medical facility to obtain the samples. If the employee is unconscious or otherwise unable to affirm consent to the procedure and the treating medical facility declines to draw the sample, the railroad shall immediately make available to the facility the consent form required by paragraph (c) of this section and request that a blood sample be drawn. In the event the medical facility initially declines to cooperate in obtaining the required samples from an injured employee, the railroad shall immediately notify the Office of Safety, FRA, by telephone, through the appropriate FRA regional office or field office. FRA will then take appropriate measures to assist in obtaining the required samples.

(ii) Nothing in this subpart shall be construed to limit the discretion of a physician to determine whether drawing a blood sample is consistent with the health of an injured employee or an employee afflicted by any other condition that may preclude drawing the specified quantity of blood.

(6) (i) In the case of an employee fatality the railroad shall immediately notify the appropriate local authority (such as a coroner's office) of the fatality and the requirements of this subpart, requesting the local authority to assist in obtaining the necessary body fluid or tissue samples.

(ii) If the local authority takes custody of the deceased for the purpose of conducting an autopsy or toxicological tests, the railroad shall immediately notify the Office of Safety, FRA, by telephone, through the appropriate FRA regional office and shall immediately deliver to such authority the consent form required by paragraph (c) of this section. The FRA will contact the local authority to obtain appropriate body fluid or tissue samples for testing.

(iii) If the local authority does not immediately take custody of the deceased, the railroad shall notify the Office of Safety, FRA, by telephone, through the appropriate FRA regional office, immediately making available to FRA the consent form required by paragraph (c) of this section. FRA will then take appropriate measures to obtain the necessary samples.

(b) *Accidents covered.* Post-accident toxicological tests shall be conducted for—

(1) Any passenger, freight, or work train accident described in § 225.19(c) of this title ("Rail equipment accident") that involves one or more of the following:

(i) A fatality;

(ii) A reportable injury to an employee or other person, as defined in § 225.5 of this title;

(iii) Damage to railroad property of $150,000 or more; or

(iv) Release of hazardous materials, other than a release of a small quantity of product from the valves or fittings of a single tank car where—

(A) The tank remains upright;

(B) There is no damage to the tank; and

(C) The release does not occasion an evacuation.

(2) Any train incident that involves one or more of the following:

(i) A fatality; or

(ii) Loss of an arm, leg, or eye. However, no test shall be required in the case of a collision between railroad rolling stock and a motor vehicle or other conveyance at a rail/highway grade crossing or in the case of a train incident consisting solely of a fatality or injury to a trespasser.

(c) *Consent requirement.* (1) Each railroad shall require as a condition of employment in covered service that each of its employees consent to testing under this subpart, and each employee engaged in covered service after the effective date of this subpart shall be deemed to have so consented.

(2) In order to assure that employees are made aware of the requirements of this subpart and to provide a record of consent of the employee to tests under this subpart, each employee in covered service shall execute a consent form containing the statements contained in Appendix B to this part. The writing shall be witnessed by at least one person familiar with the identity of the employee and shall be retained for the duration of the employee's service with the railroad, or until a replacement form is executed, in an office of the railroad as close as practical to the territory where the employee is assigned.

(d) *Notification of results.* FRA notifies the railroad and the tested employee of the results of the toxicological analysis and permits the employee to respond in writing to the results of the test prior to preparing any final investigation report concerning the accident or incident. Results of the toxicological analysis and any response from the employee are also promptly made available to the National Transportation Safety Board on request.

(e) *Sample retained.* Each sample provided under this subpart is retained for not less than six months following the date of the accident or incident and may be made available to the National Transportation Safety Board (on request) or to a party in litigation upon service of appropriate compulsory process on the custodian of the sample at least ten (10) days prior to the return date of such process. It is the policy of FRA to request the Attorney General to oppose production of the sample to a party in litigation unless a copy of the subpoena,

order or other process is contemporaneously served on the Chief Counsel, FRA, Washington, D.C.

(f) *Report.* If the railroad is unable, as a result of noncooperation of an employee or any other reason, to obtain a sample and cause it to be provided to FRA as required by this section, the railroad shall make a concise narrative report of the reason for such failure and any responsive action taken to the cause of such failure (if appropriate). This report shall be appended to the report of the accident/incident required to be submitted under part 225 of this subchapter. In any case where FRA has been provided telephonic notice of any problem in obtaining a sample (*e.g.*, in the case of a fatality or injury requiring medical attention), the report required by this paragraph shall make reference to the date and time of such notification and the FRA representative who received the notice.

(g) *Condition on employment in covered service; sanction.* (1) An employee who declines to affirm consent to testing by executing the form required by this section shall not be assigned to or continued in covered service until the employee agrees to provide such consent.

(2)(i) An employee who refuses to cooperate in providing a blood or urine sample following an accident or incident specified in this section shall immediately be withdrawn from covered service for a period of at least six months following such accident or incident.

(ii) After withdrawing the employee from covered service under this paragraph, the railroad shall provide an opportunity for hearing before a carrier official other than the charging official. The hearing shall be convened within the period specified for post-suspension hearings in the applicable collective bargaining agreement. In the absence of an agreement provision, the employee may demand that the hearing be convened within 10 calendar days of suspension or, in the case of an em-

ployee who is unavailable due to injury, illness, or other sufficient cause, within 10 days of the date the charged employee becomes available for hearing. For purposes of this subpart, the only issue at such a hearing shall be whether the employee refused to submit to testing, having been requested to submit, under authority of this subpart, by a representtaive of the railroad or attending medical personnel.

§ 218.107 Pre-employment Drug screens.

(a) On or after [the effective date of this subpart], each applicant for a position with a railroad that involves the performance of covered service shall be tested for the presence of alcohol and drugs. The test shall be accomplished through analysis of a urine sample or other reliable method. Whenever feasible, the sample shall be obtained in connection with a pre-employment physical examination.

(b) An applicant shall be advised as soon as practical, but not less than 7 days prior to the examination, that the applicant will be required to provide a urine or other body fluid sample for testing and that the sample will be tested for the presence of alcohol and drugs. In the case of an applicant who declines to be tested and withdraws the application for employment, no record shall be maintained of the declination.

(c) The railroad shall cause the samples obtained under this section to be identified, preserved, and tested by a competent laboratory for the presence of drugs, including, at a minimum, the following substances: alcohol, opiates (narcotics), cocaine, barbiturates, amphetamines, cannabis, hallucinogens, and any other drug(s) identified by the carrier medical officer as in frequent use in the locality.

(d) If the first test of a sample is positive for any drug, the sample shall be tested a second time by another laboratory, or by another method, to confirm the finding.

(e) The railroad shall notify the applicant of the results of the test(s) and shall, in the case of a positive result, provide the applicant with an opportunity to explain the presence of the identified substance prior to taking any action on the application for employment.

(f)(1) Each railroad shall retain records of tests conducted under this section for at least 2 years and make them available to FRA for review. Such records need not reflect the identity of any applicant not employed in covered service.

(2) Not later than March 1 of each year the railroad shall report to FRA concerning pre-employment tests conducted in the previous calendar year. The report shall indicate the number of tests conducted and the number of those tests that were positive, inconclusive, and negative, respectively. With respect to positive tests, the report shall identify the substances detected (by generic name) and the number of tests with respect to which each such substance was detected. The report shall also contain a short narrative summary describing the current policy and practice of the railroad with respect to employment, and subsequent handling, of applicants whose tests were positive.

(g) An applicant who has refused to submit to pre-employment testing under this section shall not be employed in covered service during any period such refusal may continue.

(h) The requirements of this section shall not apply to any railroad that employs a total of not more than 15 employees who perform covered service.

§ 218.109 Authority to test for cause.

(a) *Grant.* A railroad subject to this subpart may, upon just cause, and consistent with the provisions of this section, require any covered employee, as a condition of employment in covered service, to cooperate in breath

testing, urine testing, or both, to determine compliance with § 218.103 of this subpart or a railroad rule implementing the requirements of § 218.103. This authority is limited to duty hours (including any period of overtime or emergency service). Each covered employee shall be deemed to have consent to such testing. The provisions of this section apply only where, and to the extent that, the test in question is conducted in reliance upon the authority conferred by this section.

(b) *Just cause.* (1) The following circumstances constitute just cause for testing an employee under this section:

(i) A supervisory employee of the railroad has a reasonable suspicion that the employee is currently impaired by alcohol or any drug, based upon specific, personal observations that the supervisory employee can articulate concerning the appearance, behavior, speech or body odors of the employee;

(ii) The employee has been directly involved in an accident or incident reportable under Part 225 of this title; or

(iii) The employee has been directly involved in one of the following operating rule violations or errors:

(A) Occupancy of a block to which entry was not authorized;

(B) Failure to observe clearance limitations when setting out of rolling stock (on completion of a switching operation);

(C) Failure to protect a train as required by a rule consistent with § 218.37 of this part;

(D) Operation of on-track equipment at a speed at least 10 miles per hour greater than the maximum authorized speed prescribed by the railroad;

(E) Alignment of a switch in violation of a railroad rule or operation of a switch under a train or switching movement; or

(F) Violation of any other operating rule, timetable instruction, special instruction, general order, bulletin order, or other written directive of the kind which directly affects safe movement of a train, switching movement or lite engine in a way that could result in a train accident (including any such violation detected in an operational or efficiency test).

(2) Nothing in this paragraph shall authorize testing of an employee after the expiration of a 12-hour period from the time of the observations or other events described in this paragraph.

(c) *Limitation on number of tests.* (1) No employee shall be required to cooperate in more than three test procedures in any 12-month period, or more than two test procedures in any 30-day period under paragraph (b) of this section, except where a previous test of the employee during the previous 12 months was positive. Tests required by § 218.105 of this subpart shall not be counted toward these limitations.

(2) As used in this paragraph, a single "test procedure" may include the provision of both breath and urine samples. A single breath test procedure may include a follow-up test after a positive reading and may also include the provision of a breath sample for the purpose of preliminary screening. A urine test procedure may include the provision of not more than two samples from the same employee.

(3) If an employee is required to submit to a preliminary screening test the results of which are negative, the employee shall not be required to provide another breath sample during that duty tour.

(d) *Test safeguards.* (1) *Breath testing.* The following conditions apply to breath testing authorized by this section, other than tests the results of which are not used for disciplinary purposes:

(i) Testing devices shall be of evidential quality, as determined in accordance with standards or guidelines issued by the Department of Transportation, and shall be maintained and calibrated in accordance with the manufacturer's instructions;

(ii) Tests shall be conducted by a qualified operator in accordance with procedures specified by the manufacturer of the testing device, consistent with sound technical judgment, and shall include appropriate restrictions on ambient air temperature;

(iii) If an initial test is positive, the employee shall be tested again after the expiration of a period of not less than 20 minutes, in order to confirm that the test has properly measured the alcohol content of deep lung air; and

(iv) Any test result of less than .02 BAC shall be deemed a negative test.

(2) *Urine testing.* The following conditions apply to urine testing authorized by this section, other than tests the results of which are not used for disciplinary purposes;

(i) The sample(s) shall be collected at a place of reasonable privacy on the railroad (subject to the presence of one representative of the railroad of the same sex) or at an independent medical facility;

(ii) In the case of a sample obtained by a railroad representative, the sample shall be marked and sealed in the presence of the employee and the railroad shall maintain a controlled chain of custody of the sample and shall take reasonable precautions to maintain sample quality;

(iii) The sample(s) shall be analyzed by a reliable method and, if positive for a substance other than alcohol, shall be retested by a second laboratory or by another method; and

(iv) Any test result convertible to an estimated BAC below .02 shall be deemed a negative test for alcohol.

(3) Employee option.

(i) In any case where a breath test is intended for use in the disciplinary process and the result is positive, the employee shall be given the prompt opportunity to provide a blood sample at an independent medical facility for analysis by that facility or another independent laboratory. The railroad shall provide the required transportation to facilitate the blood test.

(ii) In any case where a urine test is intended for use in the disciplinary process, the employee shall also be given the prompt opportunity to provide a blood sample at an independent medical facility for analysis by that facility or another independent laboratory. This paragraph (d)(3)(ii) shall not apply in a case where the railorad utilizes a portable or other on-site urine test method and the result of the urine test is negative.

(e) *Presumption.* If an employee has tested positive for a material quantity of alcohol or a drug in a urine test and the employee was afforded and declined the opportunity to provide a blood sample, the railroad (or a board of arbitration) may presume from the presence of alcohol or the identified drug that the employee was impaired by that substance within the meaning of § 218.103 of this subpart.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C87-353R

AIRLINE PILOTS ASSOCIATION INTERNATIONAL,
Plaintiff,

v.

ALASKA AIRLINES, INC.,
Defendants.

ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND GRANTING JUDGMENT FOR DEFENDANT

[Filed Aug. 11, 1987]

THIS MATTER comes before the court on a motion by plaintiff Air Line Pilots Association, International, for preliminary injunction. Having reviewed the motion, together with all documents filed in support and in opposition, and being fully advised, the court finds and rules as follows:

I. FACTUAL BACKGROUND

This case involves a challenge to rules issued by defendant Alaska Airlines, Inc. ("AA"), requiring all employees, including those represented by plaintiff Air Line Pilots Association, International ("ALPA"), to comply with a drug and alcohol testing program. Among other things, the program provides that all applicants for employment and all employees returning to work after an absence of more than sixty days must submit to a drug screen.

In addition, a drug screen or alcohol testing can be required "[w]hen an employee's job performance or behavior while on or off the job provides a reasonable basis to believe that the employee has a chemical dependency or abuse problem." AA System Regulations Section 2.450, p. 5. Thus, according to the new rules, a supervisor who suspects that an employee may be under the influence of drugs or alcohol must promptly remove the employee from service and arrange for testing. The employee cannot return to work until the results of the tests become available. If the results are negative, the employee is fully compensated for the time out of service. Any employee who tests positive on a drug screen and later returns to work under the new rules is thereafter subject to mandatory drug testing without prior notice.

When the rules were proposed in November of 1986, ALPA, as collective bargaining representative for AA pilots, requested that AA bargain with ALPA concerning the program. But AA refused and the new regulations became effective on December 8, 1986.

ALPA then filed a complaint in this court alleging that AA's unilateral promulgation of the new drug and alcohol policy is a violation of its collective bargaining obligation. ALPA now moves for a preliminary injunction barring AA from enforcing the new rules until the bargaining rights and obligations of the parties have been determined. AA responds that it has no duty to bargain concerning the rules, that an arbitration proceeding is the proper forum for the parties to discuss their differences, and that the court should deny ALPA's request for interim injunctive relief.

II. LEGAL ARGUMENT

The relationship between AA and ALPA is governed by the terms of the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.* Labor disputes under the RLA are divided into "major disputes," which involve the forma-

tion or alteration of collective bargaining agreements, and "minor disputes," which concern grievances arising out of an agreement or questions of contractual interpretation and which must be settled pursuant to the RLA's mandatory arbitration procedures. *Elgin J. & E. Ry. v. Burley*, 325 U.S. 711, 723 (1944); *O'Donnell v. Wien Air Alaska*, 551 F.2d 1141, 1146-47 (9th Cir. 1977).

ALPA contends that the controversy over the new drug and alcohol testing program is a "major dispute," and that AA is thus required to bargain with ALPA about the proposed changes. *See* 45 U.S.C. § 152 of the RLA, which specifically forbids an employer to alter the working conditions of employees as embodied in collective bargaining agreements unless the provisions of § 156 regarding bargaining to change the terms of agreements are followed. ALPA further contends that AA should be enjoined from enforcing the new policy pending its compliance with § 156. Even if the dispute is characterized as "minor," ALPA asks the court to enjoin AA's enforcement of the program pending mandatory arbitration of ALPA's grievance covering the matter.[1] AA counters that the dispute is "minor" in nature and that ALPA is not entitled to an injunction because it has not satisfied the prerequisite of showing irreparable injury or that the balance of hardships tips in its favor.

In order to determine whether this dispute is major or minor, the court must decide whether AA's enforcement of the new policy is "expressly and arguably predicated on the terms of the [existing] agreement [between AA and ALPA], as illuminated by long-standing practices." *Id.* at 1147 (*quoting Switchmen's Union v. Southern Pacific Co.*, 398 F.2d 443, 447 (9th Cir. 1968).

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[1] Without conceding that the dispute is in fact minor, ALPA has taken the precaution of filing a grievance about the new policy. Affidavit of Dale Caley, Exhibit 1.

If so, the dispute is minor, and the court must then determine whether injunctive relief is appropriate. If not, the dispute is major and ALPA is entitled to have AA enjoined from enforcing the new policy until AA has fulfilled its bargaining obligation under the RLA.

AA argues that, since the mid-1970's, its internal rules have specifically banned any use of drugs by pilots as well as the consumption of alcohol on or prior to duty. Since at least 1947, the collective bargaining agreement has also allowed AA to require a pilot to undergo medical examinations at AA's expense. Section 23.C. of the agreement states as follows:

> C. Should the Company [AA] require a pilot to be examined, in addition to the prescribed FAA physical examinations, said examination shall be considered a Company physical examination and shall be at Company expense. The Company shall indicate to the pilot the reason(s) for the physical examination. . . .

AA contends that this language places no restrictions on these examinations, thus leaving AA complete discretion to determine when, how and why they shall take place.

ALPA responds that, far from arguably supporting AA's unilateral imposition of a new drug and alcohol testing program, the language of the collective bargaining agreement explicitly requires AA to bargain with ALPA concerning the proposed change. ALPA first contests AA's argument that it has unrestricted discretion to require a pilot to complete a medical examination by pointing to Section 23.A., which provides that "[t]he physical standards required of a pilot shall be the standards established and administered by the Federal Aviation Agency, [sic] including its waiver and exemption policy." ALPA stresses that the Federal Aviation Agency ("FAA") regulations governing the standards for medical certification of pilots do not contain any provisions

concerning testing for use of drugs or alcohol. 14 C.F.R. § 67.1 *et seq.* They only provide that, in order to receive a first-class medical certificate, an applicant must have no established medical history or clinical diagnosis of alcoholism or drug dependence.[2] *Id.* at § 67.13(d)(i)(c) and (d).

As further proof that the Federal Aviation Agency has not yet promulgated standards concerning testing for drug and alcohol use, ALPA asserts that in December of 1986, the FAA published an advance notice of proposed rulemaking concerning control of drug and alcohol use for personnel engaged in commercial and general aviation activities. 51 Fed. Reg. 44432; 52 Fed. Reg. 2547.

After pointing out the gaps in the existing FAA regulations, ALPA cites Section 23.B.2. of the collective bargaining agreement, which states:

> 2. In the event of change by the Federal Government in the method of medical certification or standards, [ALPA] may, notwithstanding the provisions of Section 31, "Duration" give thirty (30) days written notice pursuant to Section 6 of the Railway Labor Act, as amended, for the purpose of negotiating with respect to the provisions of this Section 23 of the Agreement.

ALPA contends that it is plain on the face of the agreement that ALPA's ability to require medical examinations is limited by the scope of existing FAA standards, which do not now provide for mandatory drug and alcohol test-

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[2] Alcoholism is defined as "a condition in which a person's intake of alcohol is great enough to damage physical health or personal or social functioning, or when alcohol has become a prerequisite to normal functioning. 14 C.F.R. § 67.13(d)(i)(c). Drug dependence is defined as "a condition in which a person is addicted to or dependent on drugs other than alcohol, tobacco or ordinary caffeine-containing beverages, as evidenced by habitual use or a clear sense of need for the drug." *Id.* § 67.13(d)(i)(d).

ing under the circumstances set forth in AA's new policy.

Having carefully reviewed ALPA's arguments, the court finds that it cannot agree with ALPA's conclusion. It is true that existing FAA regulations specifically provide for drug and alcohol testing only under certain narrow conditions. However, it is also clear that the FAA does prohibit crew members from operating aircraft while under the influence of alcohol or while using any drug that affects the person's faculties in any way contrary to safety. 14 C.F.R. § 91.11(a)(1)-(4). The collective bargaining agreement between ALPA and AA, Section 23.A and C, can be read to permit AA to require an examination, including a drug or alcohol test, in order to ascertain whether a pilot is complying with the FAA physical standards prohibiting crew members from acting under the influence of drugs or alcohol. Thus, the court concludes that the issue of testing under those circumstances constitutes a minor dispute.[3]

The court notes that AA rules have since at least 1976 barred the use of narcotics at any time by flight crew members; unsupervised use of narcotics is cause for immediate dismissal. Affidavit of Patrick L. Glenn, Exhibit A. Since at least 1977, AA rules have provided that "intoxication, consumption of alcohol or unauthorized drugs on or prior to duty by any flight crew member" and "use of narcotics or similar drugs" are major breaches of AA policy which may result in job termina-

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[3] The court recognizes that, as originally promulgated, the FAA regulations may not have specifically contemplated the use of urinalysis to detect the presence of drugs. However, it is not disputed that pilots have been subjected to routine urine tests for purposes of medical certification for many years. Thus, the method employed, if not the use to which it is now being put, is not novel and arguably falls within the provisions of the collective bargaining agreement.

tion, disciplinary suspension and/or long-term suspension of pass privileges. Affidavit of Dennis J. Hamel, p. 2 and Exhibit A, pp. 2, 4. The rule requiring employees to undergo a drug screen upon returning from an absence of more than sixty days has been in effect since July of 1985. Thus, the court concludes that AA's prohibition of off duty drug use has been to a large extent condoned by past practice, which in turn indicates that the AA's unilateral promulgation of new rules at most constitutes a minor dispute subject to arbitration.

A careful review of the precedent cited by the parties does not alter the court's conclusion that this case involves a minor dispute under the RLA. Unlike several of the cases cited by ALPA, the instant situation does not involve a serious departure from prior practice like random testing or regulation of off duty drug use where no such rule had existed before. *Compare Transport Workers Union v. SEPTA*, No. 87-0389 (E.D. Penn. Feb. 9, 1987); *International Brotherhood of Teamsters v. Southwest Airlines Company*, No. CA-3-86-3103-R (N.D. Tex. Jan. 6, 1987); and *Brotherhood of Maintenance of Way Employees v. Chicago and North Western Transportation Co.*, Civil Case No. 4-86-575 (D. Minn. Oct. 16, 1986).

Under the circumstances of this case, the court finds far more persuasive the reasoning in *Railway Labor Executives' Association v. Norfolk and Western Railway Co.*, No. 86 C 2064 (N.D. Ill. Feb. 2, 1987); and *International Association of Machinists and Aerospace Workers v. Trans World Airlines*, Civil Action No. 87-0403 (D.D.C. Feb. 20, 1987). In both of those cases, it was held that the drug and alcohol testing programs proposed by the employers did not constitute unilateral changes in working conditions, but rather the imposition of rules arguably justified by the existing contract and past practice.

Since only a minor dispute is involved, ALPA and AA must resolve their differences through arbitration. The

question remains whether ALPA is entitled to a preliminary injunction pending the completion of the arbitration process. In order to prove such entitlement, ALPA must show "either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and that the balance of hardships tips sharply in its favor." *Zepeda v. United States Immigration and Naturalization Service*, 753 F.2d 719, 727 (9th Cir. 1983).

Regarding ALPA's showing on the merits, the court finds that an arbitrator might well conclude that some changes in AA's program as urged by ALPA would be in order. Nevertheless, the court does not find any substantial support for ALPA's position that the program conflicts with the plain language of the collective bargaining agreement. On the issue of irreparable injury to ALPA's members, the court acknowledges the intrusion on their right to privacy and the potential harm to reputation which the pilots might suffer as a result of AA's drug and alcohol testing program.[4] But the court concludes that these possibilities do not constitute a sufficiently serious threat of hardship to outweigh the potential hardship to AA if it is enjoined from implementing its new policy and thereby handicapped in its attempt to ensure that flight crew members are not under the influence of drugs or alcohol.

For the reasons stated above, plaintiff ALPA's motion for preliminary injunction is DENIED. Given that no other issues remain to be resolved in the case, the court also grants judgment for defendant AA.

IT IS SO ORDERED.

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[4] On the other hand, AA assures the court that the results of any tests performed under the new policy will remain strictly confidential.

The Clerk of the Court is directed to send copies of this Order to counsel of record.

DATED at Seattle, Washington this 10th day of August, 1986.

/s/ Barbara J. Rothstein
BARBARA J. ROTHSTEIN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed Jan. 9, 1987]

Civil Action No. CA3-86-3103-R

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA—AIRLINE DIVISION and TEAMSTERS LOCAL 19

vs.

SOUTHWEST AIRLINES COMPANY

ORDER GRANTING PRELIMINARY INJUNCTION AND DENYING DEFENDANT'S MOTION TO DISMISS

On January 6, 1987, came on for hearing Plaintiffs' Application for Preliminary Injunction and Defendants' Motion to Dismiss and the Court having considered the evidence, briefs and arguments of counsel, enters the following Order in conformance with the Findings of Fact and Conclusions of Law announced at the conclusion of such hearing.

Plaintiffs' Application for Preliminary Injunction is GRANTED upon the Court's conclusion that with respect to employees represented by Plaintiffs, the dispute concerning implementation of the Defendant's drug and alcohol testing policy constitutes a "major" dispute as does implementation of each identifiable element of the policy.

The Application is likewise GRANTED upon the additional alternative conclusion that even if the disputes are "minor", employees represented by Plaintiffs will be subjected to the likelihood of irreparable harm if the policy is implemented and that the balancing of the equities favors an injunction maintaining the status quo pending resolution under the grievance/arbitration procedures of the parties' labor contract. Accordingly, pending both appeal and final disposition, Defendant Southwest Airlines Company, its officers, agents, servants, employees, and attorneys and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are hereby enjoined from enforcing the drug and alcohol testing policy or any element of it (as set out in Defendant's Exhibit 8 and 9 which are attached and incorporated in this order) with respect to employees represented by Plaintiffs. However, nothing in this Order prohibits Defendant from enforcement of its present rules G(4) and (5). On the same basis Defendant's Motion to Dismiss is DENIED.

Defendant by agreement has waived bond to secure this injunctive order.

/s/ Jerry Buchmeyer
JERRY BUCHMEYER
United States District Judge

* * * *

THE COURT: As I indicated to you in the conference last week, I had intended to rule on this matter orally. And these remarks that I'm going to make will constitute my Findings of Fact and Conclusions of Law.

I suspect that the 5th Circuit will resolve the matter and I think I'll do you a service by getting you to the 5th Circuit as quickly as possible so I'll do just that.

My remarks will cover first the major or minor legal issue; secondly, the management rights argument, and then third the alternative argument that even if this is a minor dispute injunctive relief should be granted.

This is obviously a suit for injunctive relief to prevent the Defendant Southwest Airlines from putting into effect unilaterally a program for detecting drug and alcohol use among employees.

In general under the Railway Labor Act, if a proposed practice by a carrier is a clear departure from the collective bargaining agreement, then a dispute over the practice is treated as a major dispute under the act and the carrier may not proceed without first negotiating with the employees' representative. However, if the practice is arguably justified by the collective bargaining agreement, including self past practices of the parties under the agreement, then a dispute is called a minor one and the carrier may proceed unilaterally, subject to arbitration process before the National Railroad Adjustment Board.

I have concluded, based on the evidence and on the arguments and the cases, that what is presented to me is a major dispute. The terms major and minor are not in the act which speaks of changes and agreements effecting rates of pay, rules or working conditions as one kind of dispute; and then also it speaks of disputes growing out of grievances or out of the interpretation or application

of agreements concerning rates of pay, rules of working conditions as another type of dispute. And the language and the distinction between major and minor disputes is drawn from that language and was first stated in the *Elgin* case, 325 U.S. 711, 1945 Supreme Court decision.

The basic facts are undisputed. Before November of 1986 Southwest Airlines had in effect 2 work rules dealing with drugs and alcohol, rules G(4) and (5). (4) states that "Reporting for or carrying on work while showing any signs of the use of intoxicants, or knowingly permitting another employee to do so, is strictly prohibited." (5) provides that "Possession of or drinking of any intoxicant or illegal possession or use of illegal or dangerous drugs on company premises, or while in uniform, and/or habitual use of intoxicants or use of illegal or dangerous drugs on or off duty will not be tolerated."

The rule—neither the rules nor the contract make any provision for drug or alcohol testing. In the 4-year period during which the Teamsters have represented the bargaining unit effected here, mechanics and related employees, none of those employees have been subjected to any drug or alcohol testing.

In early November of 1986 Southwest notified the Plaintiffs of its intention to unilaterally impose a mandatory drug and alcohol testing program. By responding to a letter that the Teamsters stated its concern for drug and alcohol abuse and requested Southwest to negotiate with it concerning the terms of a drug testing program. By reply letter Southwest stated its refusal to negotiate, its intention to proceed to implement the drug and alcohol testing program. After meeting with the 5 unions, who represent Southwest employees, and making modifications in the program initially proposed, the company did implement the drug testing program.

Defendant's Exhibits 8 and 9 at this hearing do contain the substance of the program. The union has con-

tinued to request negotiation and Southwest has continued to offer to discuss the terms of the program but not to negotiate. The program became effective January 1, 1987, although to date under the evidence that I've heard, no employee has been tested or had been disciplined under this program.

Three cases have been cited to me dealing with the implementation of drug and alcohol testing programs under the Railway Labor Act. Each of these cases involves the Burlington Northern Railroad. They are as follows: *Brotherhood of Maintenance Employees vs. Burlington Northern*, 802 F.2d 816, 8th Circuit case, 1986. I'll refer to that as *Burlington I*. *Brotherhood of Locomotive Engineers vs. Burlington Northern*, 620 F.2d 163, District Court Montana, 1985. I will refer to that as *Burlington II*; finally *Brotherhood of Locomotive Engineers vs. Burlington Northern*, 120 Labor Relations Reporter 3054, District Court Montana, 1985, and I'll refer to that as *Burlington III*. It's the same Court in Montana. And *Burlington II* and *Burlington III* are pending presently before the 9th Circuit and a decision I have been advised is expected momentarily.

On *Burlington I*, the 8th Circuit case, there was a rule, also rule G as in this case which prohibited employees from using, possessing or being under the influence of alcohol or other drugs while at work or while they were subject to be called to duty. However, nothing in the collective bargaining agreement referred in anyway to rule G or to any enforcement or investigation method.

According to the 8th Circuit, however, the parties had acquiesced in certain detection and investigation methods over the years, primarily were sensory observations, both seeing whether the employees appeared to be under the influence of alcohol, also smelling the breath to see if employees smelled of alcohol.

Initially the Railroad used only the visual observations and smelling observations. However, at one point they

began to permit the employees to use drug testing, whether breathalyzer, blood alcohol or urine analysis as defensive means to clear themselves, the employees, of accusations that they were at work while they were drunk.

In addition, during routine physical examinations required of all employees, there was urinalysis conducted. Urine tests were taken, although no drug screening was done. There was no at large or random screening or random searches. Under the past practices there had to be a particularized suspicion of a given individual, not general testing or a dragnet.

The 8th Circuit concluded that the contract did not permit the implementation of new drug testing however, that the parties had acquiesced in certain established practices and that any minor departure from these established practices would not constitute a major dispute under the labor act.

The 8th Circuit concluded that there were only minor changes involved in *Burlington I*. That in addition to voluntary use of drug tests, the company implemented mandatory testing. That was to confirm the suspicions that a particular individual, not all employees in general, had violated the drug-alcohol rule.

The 8th Circuit also felt is was a minor change to test all the members of a crew after an accident but that was to occur under the facts only after an accident happened and only when an individual's responsibility was not clear, and the Court noted that under the procedures proposed by the Burlington railroad, that not all members of the crew would be tested at random if it was obvious that one was responsible.

Finally as to the adding of a drug test to the routine physicals that were given, the 8th Circuit concluded that adding the drug screen test to the routine urine anal-

ysis [sic] phase of the established medical examination, was a minor dispute.

The decision on the urine analysis test was 2 to 1 decision. The other decisions where minor disputes were involved were unanimous.

Burlington II, the first Montana decision, the same factual background, no contractual provision regarding testing, past practice with visual surveillance by train masters or road foreman but not random dragnet testing, only a particular employee believed to be under the influence of alcohol or drugs. In that instance, the District Judge found that the new drug tests, which were to include random searching by dogs of persons or personal effects, was not arguably justified by the terms of the agreement and concluded that was a major dispute.

Burlington III, also the Montana District Court, concerned the addition of urine analysis as drug test in addition to the visual observations. The District Judge approved that as being a minor dispute, not a major one, and specifically found, however, that the complaint filed by the union did not allege that urinalysis was going to be done on a completely random basis but rather only upon those employees who were believed to have been involved in a violation of the drug-alcohol rule. Under those circumstances the District Judge found that the additional drug testing program was minor.

Now, applying the *Burlington* principles to the present case, there are two provisions in the contract concerning drug testing. Under the evidence I specifically find that there was no established past practice as there was in *Burlington*. There was some one specific incident involving Mr. Lopez in 1984. That was a situation where he was observed to be intoxicated on the job. He was offered a chance to take a test but refused. The company did not discipline him for refusing to take the test. He was disciplined for being drunk on the company premises.

The only other evidence concerned Mr. Moran who was —one who had a horrible absentee and accident record and he was given a chance to go voluntarily to an alcohol treatment program. He received probation but that was for repeated absences and accidents and was not a probation for alcohol problems or violation of the drug-alcohol rule.

So in the context of the *Burlington* cases I would find that there is no established past practice, there was a rule prohibiting the coming to work by someone who was under the influence of alcohol, or being at work under the influence of alcohol. That's G(4). There was also G(5) which was the drugs or alcohol rule; possession, selling or use on the premises or habitual use and the other elements in G(5).

In contrast to that, what I have in this case is a substantial change. It's not merely an additional urine analysis test as in *Burlington I* or *Burlington III*. It, of course, does not involve the use of a dog as in *Burlington II*. However, I have a very comprehensive rule which forbids possession, use, appearance at work under the—I'm sorry, I have a comprehensive program for monitoring, testing and punishing employees and following up on detected drug-alcohol use. And I would specifically find that the program does constitute a major dispute in its implementation and that the union would be entitled to the injunction it seeks under the Railway Labor Act.

Secondly, the management rights provision, the contract does contain this specific provision: "Employees covered by the agreement shall be governed by all company rules, regulations and orders previously or hereafter issued by proper authority of the company which are not in conflict with the terms and conditions of this agreement and which have been made available to the employees prior to becoming effective."

Defendant Southwest argues that unlike the 3 *Burlington* cases the agreement in this case gave management the prerogative to issue rules, regulations and orders during the term of the collective bargaining agreement.

I would reject the argument based on the management rights provision. In this regard I also rely on *Burlington II*, the Montana District Judge's decision, and in that case there was an argument by the railroad that it was simply asserting its management rights in implementing the additional drug testing in that case, which again was the use of the dog and also the additional urine analysis test. They claim the right to take that action as a matter of management prerogative as long as it didn't conflict with the terms of the agreement, which it did not in that case.

The District Judge in Montana rejected that decision noting that the absence of a—of a particular method of enforcement of drug testing or detection does not necessarily establish that that could be used, but rather that the conspicuous absence may reflect the fact that a particular method tolerable to both sides has existed over time and then made the finding I've noted earlier that the parties had acquiesced in the visual surveillance method by which the railroad could detect violations.

The evidence in this case fortunately is much less sketchy than in *Burlington Northern*. That's because the problem is not as acute as the alcohol problem appeared to be at *Burlington*. And again I have specific evidence of only the Lopez matter where discipline was involved and Moran where the employee was put on probation for absences.

In concluding that this was a major dispute and in rejecting the management rights argument, I would also note that in the Lopez situation the testimony before me was that the company did not consider terminating Lopez for failing to take the drug test and that indeed, that it

was the right of the individual Lopez to refuse to take the test if he so desired.

I would also note that the changes in these new rules are not covered in a number of respects by the existing rules. Again the existing rules covered in G(4), coming to work with the appearance of being intoxicated and in G(5), possession, using or selling either drugs or alcohol on the premises, or while in uniform or habitual use. In contrast the drug-alcohol policy statement that was implemented on January 1 goes much beyond those 2 rules. For example, the employees may be terminated for coming to work if there is any detectible level of drugs in the system. A specific alcohol level is given, .05 percent, which was not present in the prior rules.

New rules also cover prescription drugs and over-the-counter medication which would not be covered by the rules G(4) and G(5) unless you gave a very unusual definition to illegal or dangerous drugs in the language in G(5).

The new program also covers possession on the premises of drug paraphernalia, literature promoting illegal drug or substance use.

Specifically in paragraph 4 of the program, there are a number of charges, without repeating all of them, that while it may be that paragraph 3 wherever management has a reasonable suspicion to believe the policy has been violated, would be consistent with past practice. None of the others would be consistent with past practices as the evidence establishes.

Then finally the remaining argument—I'm sorry, there is a remaining alternative argument on the major-minor issue, and the union does argue that even if Southwest had the right to impose additional drug testing under rules G(4) and G(5) and a management rights clause that the provisions of the rules involved in the January

1, 1987 program are themselves major disputes. I would accept the arguments made by the union in that regard. I'll only indicate a couple of the major changes. One is paragraph IV(A)(1) which is testing after car or aircraft damage accident; IV(A)(2), which is testing after on duty accident or on-the-job injury; IV(A)(4) which concerns the physical for a position for which the employees have applied, being required to take drug and alcohol tests if they qualify for that; IV(B) employees release form. Those are simply examples. Others are cited in the union brief from pages 9 through 13.

The final finding and conclusion, which I will make, concerns the alternative argument and that's even if I am incorrect and if this were a minor dispute, as Southwest argues, then injunctive relief would be appropriate under traditional principles. Here if a suit is found to be minor a District Court does have discretion to issue an injunction to maintain status quo during pendency of arbitration, if the relief is necessary in order to preserve the integrity and jurisdiction of the arbitration proceeding or to prevent irreparable harm that would render any subsequent arbitration decision meaningless.

Southwest argues that there would be no irreparable harm because it is willing to and will stipulate that the adoption of the drug-alcohol policy statements is within the arbitration procedure, and that if an employee were disciplined under this drug-alcohol policy statement, that the discharge of an employee, if determined to be wrongful, could be adequately remedied by reinstatement of employment with full back pay and restoration of all benefits and no loss of seniority.

However, I would find under the evidence presented that there is an additional element of irreparable harm besides the economic harm that could be rectified by arbitration. And that would be when an employee is accused of violating the drug-alcohol policy, and that could

occur either in a situation like Lopez, it could occur in a situation after an accident, when drug testing is determined to be required by Southwest under the drug-alcohol policy statement. It could also occur when an individual refused to take a drug test in accordance with the alcohol policy statement.

Testimony indicates that the bargaining unit members are licensed, that having an accusation made of a violation of a drug-alcohol policy, even if an employee is reinstated may be difficult, if not impossible, to erase. Also it may have some direct impact upon the ability of the employees in the bargaining unit to find jobs with other companies besides Southwest either if they refuse to take the test and then are trying to find another job to mitigate damages or if after arbitration and reinstatement they should leave and then go to—attempt to go to another company to work.

The question, without question to me, is a close one, whether it's major or minor dispute being the major issue. And basically I have concluded that I have a substantially different situation presented to me by the very comprehensive drug-alcohol policy statement than was present in any one of the Burlington cases.

I will deny the Motion to Dismiss which was filed by Southwest Airlines.

I will grant the Temporary Injunction sought by the Teamsters, and I will continue that injunction in effect pending the appeal, which I hope gets a quick resolution on appeal.

The comments I think will tell the 5th Circuit why I did what I've done so that you will be able to take these comments as the decision and go forward with the appeal promptly.

None of the comments that I have made are intended to disparage in any respect the drug-alcohol policy state-

ment. Indeed it appears to be a very reasonable effort to meet a serious problem. And although there have not been any accidents to bring into question the safety record of Southwest Airlines, there is no doubt that Southwest is to be commended for attempting to meet the problem. And as I indicated in some of the questions, I see it almost every Friday afternoon when I'm sentencing in cocaine and amphetamine cases and it is a serious problem. And by the same token, I don't think the union has taken a position that the—that this is not a necessary step and that they're simply saying that negotiations should take place.

And finally none of these comments would keep the parties from getting together and settling the case if they wanted to do so. I'm not even encouraging an appeal.

As to the request by the union that the employees be notified, I don't think that's really necessary at this point. I think that all that needs to be done is just to enjoin the enforcement of those policies pending the dispossession of matter on the appeal and I'm primarily concerned with there not being any discipline. I think if they just remain in place, but not enforced pending the resolution of this on appeal. And I don't know if you plan to ask the 5th Circuit to stay but it's conceivable they may grant a stay.

Finally, as to the alternative relief I would grant the alternative relief in the form which you requested, which would be simply an injunction pending the disposition of this by the arbitrator.

Have I forgotten anything?

MR. GILLESPIE: We would ask that bond be waived in terms of this injunction. There is no showing of likely harm to the company if the injunction is granted.

THE COURT: Mr. Harris, you want to respond now or you can wait if you want the time to think about that.

MR. HARRIS: I think we would like to have an opportunity to think about that. I think we can all think of an extreme circumstance where the damages would be immeasurable, God forbid but—

THE COURT: Yes. Well, I obviously am not rendering any injunction to keep Southwest from enforcing the drug-alcohol program as exists under G(4) and (5) and I see plenty of flexibility for enforcement of that policy.

Why don't you—you need to prepare the Judgment for me, the Temporary Injunction, and need to let Mr. Harris see it to see if he has any wording changes that you all could work out in advance. If you all do have a dispute just submit them informally to me by letter and I'll resolve those and get it issued quickly. I would like to get it done very promptly so that you can go on your appeal just as quickly as possible. Can we get that done by Friday of this week?

MR. HARRIS: Certainly.

MR. GILLESPIE: Certainly.

THE COURT: I do appreciate the expeditious manner in which both sides put on the case. The briefs were excellent. I just wish you had some airline cases instead of Burlington Railroad cases.

We will stand adjourned.